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In The

Supreme Court of the United States

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CITY OF RENO, RYAN ASHTON,
and DAVID ROBERTSON,

Petitioners,

v.

CHARLA and DUSTIN CONN,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL SUPREME
COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

JOHN J. KADLIC
Counsel of Record
DONALD L. CHRISTENSEN
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In *City of Canton* v. *Harris*, this Court foreclosed § 1983 liability for inadequate police training unless "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. 378, 388 (1989). Justice O'Connor, concurring in relevant part, noted that a claim "that police officers were inadequately trained in diagnosing the symptoms of emotional illness [ ] falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference. . . ." *Id.* at 396-97. In the instant case, six sets of medical professionals performed medical, mental-health, and suicide-prevention evaluations of a detainee in the days before her suicide. Nevertheless, the Ninth Circuit below held that the City of Reno may be found liable for not training its police officers to diagnose and report detainees' symptoms of suicidal tendencies. The questions presented are:

I. Must a city train its law-enforcement officers to diagnose and report detainees' symptoms of suicidal tendencies, in order to avoid municipal liability under the Fourteenth Amendment's Due Process Clause and 42 U.S.C. § 1983?

II. Must law-enforcement officers diagnose and report detainees' symptoms of suicidal tendencies, in order to avoid individual liability under the Fourteenth Amendment's Due Process Clause and 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Petitioners are the City of Reno and two members of the Reno Police Department, Officers Ryan Ashton and David Robertson. Petitioners were defendants-appellees below.

Respondents are Dustin Conn, adult son of decedent Brenda Jean Clustka; and Charla Conn, adult daughter and special administrator of the estate of decedent. Respondents were plaintiffs-appellants below.

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PETITION FOR A WRIT OF CERTIORARI

The City of Reno, Ryan Ashton, and David Robertson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

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OPINIONS BELOW

The original opinion of the Ninth Circuit panel is reported at 572 F.3d 1047 (9th Cir. 2009). The amended panel opinion, denial of rehearing and rehearing en banc, and dissent from denial of rehearing en banc are reported at 591 F.3d 1081 (9th Cir. 2010) and reprinted at App. 1. The district court's order granting Defendants' Motion for Summary Judgment, filed on March 8, 2007, is unpublished but reprinted at App. 54.

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JURISDICTION

The court of appeals entered its judgment on July 24, 2009. It denied a petition for rehearing and rehearing en banc on January 8, 2010, and also amended its panel opinion on that day. On March 22, 2010, Justice Kennedy granted Application No. 09A882, extending the time within which to file a petition for writ of certiorari until and including May 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment to the U.S. Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

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STATEMENT OF THE CASE

This case presents two important and recurring questions of § 1983 liability on which the federal courts of appeals are intractably divided. There is an entrenched 5-2 split on whether municipalities may be held liable for failing to train law-enforcement officers to diagnose detainees' suicidal tendencies. Judge Reinhardt's opinion for the Ninth Circuit, holding that municipalities can be held liable, aggravates "a clear inter-circuit split and is irreconcilable with the standard for liability fashioned by the Supreme Court in *City of Canton* v. *Harris*, 489 U.S. 378

(1989)." *Conn*, 591 F.3d at 1086, App. 5 (Kozinski, C.J., dissenting from denial of rehearing en banc).

By joining the minority side of the split and denying rehearing en banc over the dissent of seven judges, the Ninth Circuit has deepened and entrenched that split. The panel's opinion also creates a circuit split on whether law-enforcement officers must diagnose and communicate detainees' symptoms of suicidal tendencies or be held individually liable.

Both issues recur frequently, affecting well over a million law-enforcement officers and more than fourteen million arrests across the country each year. The issues are also crucially important. Judge Reinhardt's opinion imposes novel, undefined, and potentially costly psychiatric-training duties on thousands of cities and towns throughout the nine states in the Ninth Circuit. It obligates officers to make nuanced psychiatric diagnoses, even where (as here) medical professionals repeatedly screen a detainee for suicide risk. Only this Court can resolve these conflicts and give needed, uniform guidance to cities and police departments across the country.

A. Factual Background

1. In 2005, police arrested 14.1 million persons for non-traffic offenses, including 3.4 million for alcohol-related offenses or driving under the influence. On a typical day in mid-2005, more than 747,000 inmates were detained in local jails. *Sourcebook of Criminal Justice Statistics Online*, tbls. 4.1.2005, 4.27.2005,

6.13.2005, *available at* http://www.albany.edu/sourcebook/pdf/t412005.pdf, http://www.albany.edu/sourcebook/pdf/t4272005.pdf, http://www.albany.edu/sourcebook/pdf/t6132005.pdf. Nationwide, 286 local jail inmates committed suicide in 2005. *Id.* tbl. 6.0012.2005, *available at* http://www.albany.edu/sourcebook/pdf/t600122005.pdf. That number is less than 0.04% of the daily jail population, less than 0.009% of alcohol-related arrestees, and 0.002% of all arrestees that year.

States and municipalities, including Reno, Nevada, have made substantial progress in addressing the problem of jail suicides, lowering the U.S. jail-suicide rate by almost two-thirds between 1983 and 2002. Thus, suicide is no longer the leading cause of death in jail. Christopher J. Mumola, Bureau of Justice Statistics, *Suicide and Homicide in State Prisons and Local Jails* 1, 2 tbl. (Aug. 2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf.

2. The State of Nevada has adopted two comprehensive procedures to protect intoxicated and mentally ill arrestees and inmates from harming themselves or others. First, peace officers must place publicly intoxicated persons who cannot care for their own health or safety in civil protective custody (CPC) for up to 48 hours. Nev. Rev. Stat. § 458.270 (West 2009). If intoxicated persons need emergency medical treatment, officers must first bring them to secure detoxification or emergency medical facilities before taking them to jail. *Id.*

Second, to protect the mentally ill, Nevada law authorizes a measure called a Legal 2000 hold. This protective measure authorizes officers to take into custody mentally ill persons who appear to present a clear and present danger of harm to themselves or others. Nev. Rev. Stat. §§ 433A.115, 160 (West 2009). Under a Legal 2000 hold, officers must first bring mentally ill persons to doctors, physicians' assistants, or registered nurses to be evaluated for immediate medical problems. Officers must then take these persons to mental health facilities or hospitals for detention, evaluation, and treatment for up to 72 hours. *Id.* §§ 433A.150, 165.

The Washoe County Detention Facility (the Jail) is owned and operated by Washoe County, not Reno, though it does house arrestees from Reno and surrounding areas. In addition to the procedures adopted by Nevada, the Jail also has adopted internal policies to protect mentally ill and intoxicated detainees. Immediately upon arrival at the Jail, registered nurses examine every detainee and fill out a medical screening form and a mental-health questionnaire, both of which address the detainee's suicide risk. Lindsay M. Hayes, *Technical Assistance Report on Suicide Prevention Practices Within the Washoe County Jail* 11 (Sept. 13, 2005). The Jail also offers annual suicide-prevention training for all corrections officials. *Id.* at 6.

3. Despite these efforts to prevent suicide, jail inmates such as Brenda Clustka still occasionally take their own lives. Clustka had a troubled past as a

repeat misdemeanant. In the year before her death, she was jailed four times: (1) in May 2004 for domestic battery; (2) in December 2004 for driving under the influence of alcohol (DUI), careless driving, and driving with a suspended license; (3) in February 2005 for petit larceny, DUI, and battery; and (4) in March 2005 for domestic violence against her 74-year-old mother. Ninth Circuit Excerpts of Record (ER) 23-27.

Clustka was also committed to the Northern Nevada Mental Health Institute (NNMHI), a state mental hospital, three times under the Legal 2000 procedure, in September 2001, August 2003, and April 2004, for threatening or attempting suicide. ER 98-131. All three times, she was released with instructions to follow up with her primary-care doctor and with recommendations for counseling. ER 107, 119-20, 126-28. There is no evidence in the record that Clustka followed any of these instructions.

On April 25, 2005, Clustka was put on a fourth Legal 2000 hold. ER 140-41. Her mother reported that she had threatened to overdose on her medication, so Reno police officers transported her to the Washoe Medical Center, a private hospital. ER 133-34. When doctors examined her in the emergency room, she denied threatening or attempting to commit suicide. ER 133.

Because Clustka's story contradicted her mother's account, a doctor recommended transferring her to NNMHI on a Legal 2000 hold for further evaluation.

Id. When a psychiatric nurse and then a psychiatrist evaluated her at NNMHI, Clustka again repeatedly denied any suicidal ideations, denied that she would harm herself, and refused treatment. ER 78-82. A social worker, who interviewed Clustka together with the psychiatrist, found that she posed a "low risk of [self-]harm." ER 83, 88, 90. Thus, the psychiatrist ordered staff to return Clustka's prescription drug Xanax to her. ER 83-85. When he discharged her, he judged that she did not pose a risk of suicide. ER 91. Because she was dependent on alcohol and prescription drugs, the psychiatrist and psychiatric nurse recommended that she receive alcohol treatment and counseling following her discharge the next morning. ER 84-85. There is no evidence in the record that Clustka followed her psychiatrist's advice. On the contrary, she kept blaming others for her problems, remained "unwilling to admit to [her] substance abuse problem," and rejected the psychiatrist's "[s]tron[g] encourage[ment]" to seek inpatient treatment. ER 82.

Fewer than five hours after being released on April 26, Clustka was again grossly intoxicated. ER 158-59. Emergency medical personnel employed by a local nonprofit corporation found her lying on the ground, medically evaluated her, and called Reno police. ER 182-83. Officers Ryan Ashton and David Robertson responded to the call and met the medical personnel at the scene. ER 158-59. When they told Clustka they were taking her into CPC custody, she became belligerent, began cursing, refused to accompany the officers, and insisted on going to her mother's house to get her belongings. *Id.* To calm her, Officer Robertson said they would take her home as she had asked. *Id.* The officers put her in the back of their police transport wagon, without handcuffs, and proceeded to the Jail. ER 148, 158-59, 182-85. As they prepared to leave, the results of a computer background check came in. ER 158. That background check informed the officers of Clustka's violent tendencies, drug and alcohol addictions, and mental health problems, but not of any suicidal thoughts or attempts. ER 44-48, 158.

As they were driving, Clustka unbuckled her seatbelt, approached the surveillance camera, and began tapping on it to get the officers' attention. ER 36. The officers did not respond. *Id.* When Clustka looked out the window and saw that they were approaching the Jail, she went back to her seat and wrapped her seatbelt around her neck in full view of the camera. ER 158-59. The officers immediately stopped the wagon, removed the seatbelt, handcuffed her, put her back in her seat, and buckled her seatbelt again. ER 36. As they were doing this, Clustka said: "You lied to me. Just kill me. I'll just kill myself then." ER 36, 158, 215.

Upon arriving at the Jail, Officer Ashton, a rookie, asked Officer Robertson whether to report the incident. ER 151-52. Under standard Jail procedure, a medical professional was to evaluate Clustka as soon as they arrived at the Jail. Because the officers saw Clustka's behavior as angry, attention-seeking, and manipulative rather than suicidal, they did not report it. ER 158-59, 187, 192-93, 215-16.

When Officers Ashton and Robertson turned Clustka over to the Jail staff, a registered nurse gave her a standard CPC evaluation. ER 428-30. Nothing in the record indicates that the nurse or anyone else at the Jail asked Officer Ashton or Robertson about Clustka's conduct during their encounter with her. For the fourth time in just over 24 hours, Clustka was examined by a medical professional. The registered nurse asked Clustka a series of questions about any mental instability, anxiety, medical issues, and injuries. *Id.* Clustka denied everything except for a headache. *Id.* Four hours later, after she had sobered up, Clustka was released and served with a Temporary Protective Order (TPO) sought by her mother because of Clustka's domestic battery. ER 44.

Late that night, police again detained Clustka on a CPC and brought her to the emergency room. A physician found no basis for further detaining or treating her and discharged her on April 27. ER 432.

Hours later, on April 27, Clustka returned to her mother's house in violation of the TPO. ER 51-52. There, different officers arrested her for violating the TPO and for domestic violence against her elderly mother. *Id.* After booking, a nurse at the Jail screened her for suicidal tendencies once again. ER 53-58. This was the sixth time in 48 hours that a medical professional evaluated Clustka. Clustka again denied having suicidal ideations or past suicide attempts. *Id.*

The nurse recommended assigning Clustka to the general jail population. ER 36, 56-57. Because of Clustka's history of substance abuse and mental illness, however, she was placed in the mental health unit to alert staff that she was a high-risk inmate. ER 36. A psychiatric nurse was scheduled to examine her the next day. *Id.* On the morning of April 28, Clustka took her life in her jail cell. ER 36, 59-62. Shortly afterward, Officer Ashton arrived at the jail with another arrestee and learned that Clustka had committed suicide. ER 151-53. Officer Ashton eventually wrote a full and detailed report of his interactions with Clustka on April 26. ER 74, 157-59.

B. Proceedings Below

1. Respondents Charla and Dustin Conn, Clustka's adult children, filed this suit in the U.S. District Court for the District of Nevada under 42 U.S.C. § 1983. They sought compensatory and punitive damages, as well as declaratory and injunctive relief, against the City of Reno for its alleged failure to train its law enforcement officers and failure to implement policies to prevent suicides. They sued the city, not Washoe County, even though the Jail is a county agency. They also named Officers Ashton and Robertson as defendants for their alleged deliberate indifference to Clustka's serious medical need. The district court granted summary judgment to Reno and both officers on all claims. App. 73.

2. In an opinion by Judge Reinhardt, the Ninth Circuit reversed.

a. The panel held that a jury could find Reno liable for failing to train its police officers to prevent suicides. Under *Harris*, such liability under § 1983 is possible only if the "city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." 489 U.S. at 392. Even though Officers Ashton and Robertson took Clustka to a jail where a medical professional immediately evaluated her, the panel believed that Reno exhibited "deliberate indifference" by failing to train the officers themselves to diagnose suicidal ideations. "[O]fficers predictably face situations where they must assess and react to suicide risks" and "are the first law enforcement officials to deal with detainees . . . in highly stressful situations." *Conn*, 591 F.3d at 1103, App. 47.

According to the panel, the "failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue." *Id.*, App. 48. Likewise, the panel held that a jury could find Reno liable for failing to adopt and implement policies to prevent suicides, for two reasons: first, because "there was no written policy on reporting suicide threats"; and second, because "neither Robertson nor Ashton was disciplined for failing to report Clustka's suicide threat, although each received negative comments about the incident in their annual evaluation." *Id.* at 1104, App. 49-50.

b. The panel also held that a jury could find the officers themselves deliberately indifferent to Clustka's serious medical need, because a jury could find that they "were . . . subjectively aware of" Clustka's need for treatment based on the seatbelt incident and "failed to adequately respond." *Id.* at 1096, App. 30. In addition, the panel rejected the officers' claim of qualified immunity. In the panel's view, "[w]hen a detainee attempts or threatens suicide en route to jail, it is obvious that the transporting officers must report the incident to those who will next be responsible for her custody and safety." *Id.* at 1102, App. 45. Because the panel considered that proposition "obvious," it held that "the constitutional right at issue here has been clearly established." *Id.*

c. Because neither the individual nor municipal-liability claims could be resolved on summary judgment, the panel reversed and remanded to let both proceed to a jury trial.

3. The court of appeals denied a petition for rehearing en banc. 591 F.3d 1081, 1085 (9th Cir. 2010), App. 2. Chief Judge Kozinski, joined by Judges O'Scannlain, Kleinfeld, Tallman, Callahan, Bea, and Ikuta, dissented from the denial of rehearing en banc. *Id.*

a. In the dissenting opinion, Chief Judge Kozinski noted that the State's obligation is simply "not to purposefully create a risk of harm" to prisoners. *Id.* at 1085, App. 4. He explained that Reno satisfied that duty here. County and city officials gave Clustka multiple medical assessments and treatment. *Id.* at 1086-87, App. 7. They would have given her more had she responded truthfully to the medical professionals' questions. Thus, Reno did not purposefully create opportunities for her to harm herself. *Id.*

More broadly, Chief Judge Kozinski raised grave federalism concerns about the panel's "unprecedented judicial intervention in our local institutions." *Id.* at 1085, App. 3. Democratically elected officials, not judges, are responsible for deciding whether to offer more care and social services. The opinion, he objected, empowers federal judges to "micromanage the police, who in turn will serve as mental health professionals." *Id.* In conjunction with Washoe County, Reno had gone above and beyond its obligations by having multiple sets of medical professionals evaluate Clustka in the 48 hours before she committed suicide. The panel nevertheless found Reno's efforts inadequate, requiring that police officers likewise be trained as "suicide prevention experts." *Id.* at 1086, App. 5. This "novel holding," he feared, will "have far-reaching consequences." *Id.*

Judge Reinhardt's opinion "creates a clear inter-circuit split" involving decisions of the First, Third, Fifth, and Eleventh Circuits, Chief Judge Kozinski explained. *Id.* It also conflicts with this Court's decision in *City of Canton* v. *Harris*, 498 U.S. 378

(1989). *Conn*, 591 F.3d at 1086 (Kozinski, C.J., dissenting from denial of rehearing en banc), App. 7 ("'The claim in this case – that police officers were inadequately trained in diagnosing the symptoms of emotional illness – falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference. . . .'" (quoting *Harris*, 498 U.S. at 396-97 (O'Connor, J., concurring in relevant part and dissenting in part))). Suicide-prevention policies were in place, and Reno should not be liable simply because the panel thought other policies would be more effective. *Conn*, 591 F.3d at 1087 (Kozinski, C.J., dissenting from denial of rehearing en banc), App. 7-8. Under *Harris*, "deliberate indifference means more than negligence," but the panel's opinion conflates the two. *Id.*, App. 9.

b. Chief Judge Kozinski reasoned that the officers were also entitled to qualified immunity. The officers neither withheld psychiatric care nor interfered with Clustka's treatment. "The panel's denial of qualified immunity in these circumstances means that officers can no longer leave the treatment of medical issues to trained medical professionals. Instead, they must actively assist those professionals by providing any information potentially relevant to a diagnosis." *Id.* at 1088, App. 10. Clearly established law, however, creates no such duty to share information, so the officers should enjoy qualified immunity. *Id.* at 1088-89, App. 11-12. Chief Judge Kozinski noted that the panel's decision on this point conflicted with case law from the Third Circuit. *Id.* at 1089, App. 12.

c. In conclusion, Chief Judge Kozinski criticized Judge Reinhardt's opinion as "a sweeping and dangerous precedent" that "severely undermine[s] the autonomy of local governments. . . ." *Id.* at 1090, App. 16.

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REASONS FOR GRANTING THE WRIT

This case presents two entrenched circuit splits on recurring questions that greatly affect cities and law enforcement officers across the country. In each area – municipal liability and officers' duty to provide medical treatment -- the Ninth Circuit's decision conflicts with decisions from this Court.

First, the courts of appeals have split 5-2 on whether municipalities can be held liable for failing to train law-enforcement officers to diagnose detainees' suicidal tendencies. The Ninth Circuit takes the minority side of the split, holding here that the failure to provide such training can satisfy the high standard of deliberate indifference required by *Harris*. Its decision also disregards *Harris*'s admonition that plaintiffs must show that the municipality's training failed to "enable[ ] officers to respond properly to the usual and recurring situations with which they must deal." 489 U.S. at 391. Because the "diagnosis of mental illness is not one of [these] 'usual and recurring situations,'" a mere claim that "police officers were inadequately trained in diagnosing the symptoms of emotional illness [ ] falls far short of the kind of 'obvious' need for training that would support a finding of [municipal] deliberate indifference. . . ." *Id.* at 396-97 (O'Connor, J., concurring in relevant part and dissenting in part).

Second, the Ninth Circuit's holding regarding the officers' individual liability creates an additional circuit split. While the Ninth Circuit in this case held that the Due Process Clause requires law-enforcement officers to diagnose and report symptoms of mental illness, the First and Third Circuits have reached the opposite conclusion. This Court has held that a showing of deliberate indifference is necessary to make out a claim of constitutionally inadequate care. And it held in *Davidson* v. *Cannon* that a mere failure to communicate in a single case – in *Davidson*, even a negligent failure to communicate – falls well short of satisfying that standard. 474 U.S. 344, 348 (1986). The Ninth Circuit's decision conflicts with that holding.

These issues recur every day across America, as each year well over a million police officers arrest more than fourteen million people. The issues are also crucially important. Detecting suicidal ideations requires a medical diagnosis, one that is even more complicated for intoxicated detainees. This is a needle-in-a-haystack problem: in the Ninth Circuit, officers must now detect and report myriad potential symptoms of suicidal ideations in all 38,000 arrestees each day to prevent less than one actual suicide among them. Marked improvements might require formal psychological exercises or even clinical training, forcing cities to spend indefinite and potentially devastating amounts of time and money. Only in hindsight can cities know how much training was enough to prevent suicides, and the Constitution does not require perfect foresight. This Court's review is imperative to provide uniform guidance to thousands of cities and millions of officers across the country.

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ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *CITY OF CANTON* v. *HARRIS*, EXACERBATING A SUBSTANTIAL CIRCUIT SPLIT OVER § 1983 MUNICIPAL LIABILITY FOR NOT TRAINING LAW-ENFORCEMENT OFFICERS TO DIAGNOSE SUICIDE RISK

Under this Court's decision in *Harris*, the Ninth Circuit erred in holding a city liable under § 1983 for not training law-enforcement officers to diagnose arrestees' suicidal tendencies. This Court in *Harris* warned that a plaintiff cannot hold a city liable for failure to train merely by "prov[ing] that an injury or accident could have been avoided if an officer had had better or more training," since "[s]uch a claim could be made about almost any encounter resulting in injury. . . ." 489 U.S. at 391. The Ninth Circuit not only disregarded that warning here, but also widened and deepened a "clear inter-circuit split." *Conn*, 591 F.3d at 1086 (Kozinski, C.J., dissenting from denial of rehearing en banc), App. 5. While the Ninth Circuit's holding accords with a Third Circuit ruling, five federal courts of appeals – the First, Fifth, Sixth, Seventh, and Eleventh Circuits – have rejected such claims. Because the question presented is recurring and important to cities and towns struggling to interpret *Harris*, it merits this Court's review.

A. Since *Harris*, the Circuits Have Divided 5-2 Over a Municipality's Duty to Give Officers Suicide-Diagnosis Training

1. Five Federal Courts of Appeals Have Rejected Municipal Liability for Failure to Train Officers to Diagnose Detainees' Suicidal Tendencies

Five federal courts of appeals have rejected municipal liability under § 1983 for failing to train law-enforcement officers to diagnose suicidal tendencies. In direct conflict with the Ninth Circuit's decision below, these decisions have held that such diagnosis is not a "usual and recurring" part of an officer's job. *See Harris*, 489 U.S. at 391. The circuit split is especially clear in cases factually similar to this one, involving drunk or otherwise intoxicated arrestees who are often belligerent or distraught at being arrested.

In the Fifth Circuit, diagnosing detainees' suicidal ideations is not a typical task expected of police officers. Thus, the Fifth Circuit has held that a "[f]ailure to train police officers in screening procedures geared toward detection of detainees with suicidal tendencies" does not "rise to the level of a constitutional deprivation. . . ." *Burns* v. *City of Galveston*, 905 F.2d 100, 104 (5th Cir. 1990). In *Burns*, a drunk detainee shouted that if officers did not give him a cigarette "he would kill himself." *Id.* at 101. The officers discounted his behavior as drunken but not suicidal, though he committed suicide less than an hour later. *Id.* at 101-02. His mother filed a § 1983 claim against the city for inadequately training police officers in "medical screening and suicide detection procedures." *Id.* at 103. The district court rejected the claim and granted summary judgment for the city. The Fifth Circuit affirmed. Diagnosing a detainee's suicidal ideations "requires the skills of an experienced medical professional with psychiatric training, an ability beyond that required of the average police officer by the due process clause." *Id.* at 104.

Similarly, the Eleventh Circuit has held that a city's mere failure to train officers to diagnose suicidal tendencies "is insufficient to establish deliberate indifference," as an officer "is not the guarantor of a prisoner's safety" when it comes to suicide detection. *Popham* v. *City of Talladega*, 908 F.2d 1561, 1564 (11th Cir. 1990). Thus, *Popham* affirmed summary judgment for the city on a § 1983 failure-to-train claim based on an intoxicated detainee's suicide. *Id.* The Eleventh Circuit was also unwilling to hold officers individually liable for the suicide without the clearest proof of actual knowledge. Simply knowing that an inmate has threatened suicide while under the influence of alcohol or drugs does not give officers sufficient "reason to believe" the inmate is actually suicidal. *Id.* at 1564.

Agreeing that municipalities should not be liable for failure to train in these circumstances, the Sixth and Seventh Circuits have suggested that suicide detection is beyond the competence of the typical police officer. In *Barber* v. *City of Salem*, a drunk arrestee had expressed worries that the arrest would harm "his job, his engagement, and his ability to obtain custody of his young son. . . ." 953 F.2d 232, 240 (6th Cir. 1992). He later committed suicide in jail. The court affirmed summary judgment for the officers and the city in a § 1983 suit. It held that officers could not be expected to discern suicidal tendencies and ideations in this drunken speech, as "such a reaction to an arrest for driving under the influence of alcohol could not be considered abnormal. . . ." *Id.* Because the officers never violated the Constitution, the city could not be liable for failing to train them and adopt suicide-prevention policies. *Id.*

Likewise, in a Seventh Circuit case, a detainee explicitly told officers that he had attempted suicide a few days ago, but he was drunk, made the statement in a joking manner, and said he was fine now. *Boncher ex rel. Boncher* v. *Brown Cty.*, 272 F.3d 484, 485-86 (7th Cir. 2001) (Posner, J.). Officers discounted the statement as that of a "happy drunk," but the detainee later committed suicide. *Id.* at 486. Judge

Posner refused to find § 1983 liability for failure to adopt better intake questionnaires or to train officers to diagnose suicidal tendencies: "It is not clear what good the [requested] better training would have done, at least in this case; the basic judgment the intake officers had to make was whether [the inmate] was joking, and that is not a judgment likely to be much assisted by special training." *Id.* at 488 (finding no deliberate indifference or constitutional violation).

The First Circuit has also agreed that suicide detection in intoxicated detainees is not a task that officers must perform. It has held that a city is not deliberately indifferent to the medical needs of "intoxicated and potentially suicidal detainees" simply because it does not train its police officers to detect suicidal tendencies. *Manarite ex rel. Manarite* v. *City of Springfield*, 957 F.2d 953, 959-60 (1st Cir. 1992) (affirming summary judgment for a city in a § 1983 suit predicated on the city's failure to train and educate police officers to detect suicidal tendencies and prevent suicides).

In sum, five federal courts of appeals have rejected municipal liability for failing to train law-enforcement officers to distinguish suicidal tendencies from intoxication. If the Ninth Circuit had applied these circuits' approaches to this case, it would have affirmed the district court's grant of summary judgment for Reno.

2. Two Courts of Appeals Have Allowed Municipal Liability for Failure to Train Officers to Diagnose Suicidal Tendencies in Detainees

In contrast with the above decisions, the Third Circuit has allowed cities to be held liable under *Harris* for failure to train their officers. In *Simmons v. City of Philadelphia*, the Third Circuit upheld municipal liability for a city's failure to train its officers to recognize suicidal tendencies in intoxicated detainees. 947 F.2d 1042, 1049 (3d Cir. 1991). Over a vigorous dissent, the court upheld a jury's award of damages against the city. *Simmons* reasoned that "training in the profile of a typical suicidal detainee, the known hours during which suicides were likely to occur, and the need for monitoring by officers or other inmates would have enabled turnkeys to prevent suicides among intoxicated detainees." *Id.* at 1075. The lead opinion also stressed that the city had introduced no evidence that training "would have proved unworkable, ineffective, or too costly," thus requiring cities to justify their policy tradeoffs in court. *Id.* (opinion of Becker, J.).

In the decision below, the Ninth Circuit joined the Third Circuit on this side of the split. *Conn*, 591 F.3d at 1089, App. 12.

3. The Split Is Mature, Entrenched, and Ripe for Resolution by This Court

In the two decades since this Court's opinion in *Harris*, the division over this issue has matured. Opinions on both sides of the circuit split have explicitly discussed, followed, and criticized precedents from sister circuits. *See, e.g.*, *Barber*, 953 F.2d at 239 (Sixth Circuit opinion discussing and adopting the Eleventh Circuit's reasoning in *Popham*); *Simmons*, 947 F.2d at 1096 (Weis, J., dissenting) (quoting the Fifth Circuit in *Burns* while criticizing the Third Circuit for requiring cities to train officers "to medically screen prisoners to detect suicidal tendencies," which would "'requir[e] the skills of an experienced medical professional with psychiatric training'"); *Conn*, 591 F.3d at 1086, App. 6 (Kozinski, C.J., dissenting from denial of rehearing en banc) (pointing out the circuit split over the issue and criticizing the Ninth Circuit for not following the First, Fifth, and Eleventh Circuit's decisions in *Manarite*, *Burns*, and *Popham*).

No consensus is likely to emerge unless this Court intervenes. The Ninth Circuit has not only joined the Third Circuit to deepen the split, but has rejected a petition for rehearing en banc over a strong dissent. The conflict is thus firmly entrenched. Only this Court can resolve it.

B. The Ninth Circuit's Decision Is Erroneous

Contrary to the decision below, *Harris* does not open municipalities to liability for failure to train officers to diagnose detainees' suicidal tendencies. The court's ruling disregarded *Harris*'s instruction not to judge training programs by hindsight or based on tasks beyond police officers' competence. Instead, the Court did precisely what *Harris* warned against. It mistakenly reasoned that because suicide-diagnosis training could possibly have averted the injury in this case, the Constitution required such training. The Ninth Circuit's weakening of *Harris*'s limitation on liability "open[s] municipalities to unprecedented liability under § 1983" and "implicate[s] serious questions of federalism." *Harris*, 489 U.S. at 391-92.

1. The Decision Below Conflicts with *Harris*

The Ninth Circuit erred in treating the diagnosis of detainees' suicidal tendencies as within the scope of police officers' duties. Municipalities may be liable under § 1983 for inadequate police training "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388. Courts must compare the training program with the particular officers' duties. *Id.* at 390. In this case, the city provided Clustka with the assistance of multiple medical professionals with training in mental health. The police officers' duties did not extend that far.

a. This Court in *Harris* took particular care to warn against the danger of reasoning backwards. A municipality ought not be responsible for a particular injury merely because, in hindsight, training directed at that injury might have prevented it. As this Court explained:

> Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the *usual and recurring* situations with which *they must* deal.

489 U.S. at 391 (emphases added). Municipalities are charged with training officers (and others) to handle the "usual and recurring situations with which they must deal," not to cure every risk with which they may come into contact. The Court, for instance, noted that when cities provide firearms to police officers, they must train them in the constitutional limits on using deadly force. *Id.* at 390 n.10.

Police officers are expected to carry and to know how to use guns; they are not expected to know how to interpret psychiatric diagnostic manuals. Diagnosing suicidal ideation is not part of the "usual and recurring situations with which" police officers – as opposed to trained medical professionals – "must deal." Thus, a city may not be held liable merely because it has not trained its police officers to diagnose these psychiatric symptoms. Indeed, Justice O'Connor, joined by Justices Kennedy and Scalia, explained how *Harris*'s holding leads precisely to that conclusion. "The claim in this case – that police officers were inadequately trained in diagnosing the symptoms of emotional illness – falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference to constitutional rights on the part of the city." 489 U.S. at 396-97 (O'Connor, J., concurring in relevant part and dissenting in part). That is because "the diagnosis of mental illness," unlike firearm use, "is not one of the 'usual and recurring situations with which [the police] must deal.'" *Id.* at 397; *see id.* at 390 n.10.

b. The Ninth Circuit engaged in just the sort of backward reasoning that *Harris* held would not "suffice" to establish municipal liability. In a key holding, the decision below reasoned that "plaintiffs have provided evidence that officers predictably face situations where they must assess and react to suicide risks in order to prevent grave harm to people under their protection." 591 F.3d at 1103, App. 47. Thus, the Ninth Circuit held, a city's failure to train police officers to diagnose suicidal ideation and tendencies "will fail to respond to serious risks of suicide and . . . constitutional violations will ensue." *Id.*, App. 48.

Police officers, however, face many risks. As this Court emphasized in *Harris*, an after-the-fact assessment of an injury can always uncover additional training that would have prevented it. The question under *Harris* is not whether training directed to the particular injury in this case could, in hindsight, have potentially prevented it. Rather, the question is whether the city acted with deliberate indifference when it determined that medical professionals, not police officers, should be charged with diagnosing suicidal ideation and tendencies – in other words, whether diagnosing suicidal ideation is one of the "usual and recurring" situations with which *police officers* must deal. As Justice O'Connor's concurrence in *Harris* underscores – and the decisions of the First, Fifth, Sixth, Seventh, and Eleventh Circuits confirm – it is not.

2. The Decision Below Contravenes the Principles of Federalism Reflected in *Harris*

Moreover, the Ninth Circuit's decision conflicts with the principles of federalism central to this Court's decision in *Harris*. *Harris* insisted on demanding standards for liability that would not "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism." 489 U.S. at 392.

Here, the Ninth Circuit second-guessed Reno's training program, seeking to micromanage local law enforcement in exactly the way that *Harris* sought to foreclose. As noted above, Clustka received repeated medical and psychological evaluations and care before, during, and after her arrests. Nevertheless, the panel held that the Constitution required the city to train its police officers to better diagnose suicide risks and prevent suicides. 591 F.3d at 1103-04, App. 48-49. That holding prevents cities from making the reasonable choice to leave diagnoses of intoxicated inmates' suicidal ideations in the hands of medical professionals. And it holds them liable after the fact if, in hindsight, they incorrectly guessed what precise measures federal courts would later require and what would prevent particular suicides. The Constitution does not require perfect foresight to avoid liability.

II. THE NINTH CIRCUIT ERRONEOUSLY IMPOSED ON OFFICERS A NEW CONSTITUTIONAL DUTY TO DIAGNOSE AND REPORT SUICIDAL TENDENCIES, CREATING A CIRCUIT SPLIT

Only "the 'unnecessary and wanton infliction of pain'" on a prison inmate violates the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976)). When inmates allege failure to provide medical care, they must prove that officials were "deliberate[ly] indifferen[t] to [their] serious medical needs." *Estelle*, 439 U.S. at 106. Pretrial detainees enjoy at least as much protection under the Due Process Clause of the

Fourteenth Amendment as prison inmates receive under the Eighth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979). Thus this Court, the decision below, and other courts use the deliberate-indifference standard to gauge the medical care owed to pretrial detainees. *See, e.g.*, *Conn*, 591 F.3d at 1094 & n.3, App. 26 & n.3 (collecting cases); *City of Revere* v. *Mass. Gen. Hosp.*, 463 U.S. 239, 243-44 (1983).

Deliberate indifference requires "something more than mere negligence" or carelessness. *Farmer* v. *Brennan*, 511 U.S. 825, 835 (1994). Yet the Ninth Circuit held that officers' simple failure to diagnose and share medical information could amount to deliberate indifference. That holding not only conflicts with this Court's and federal circuit precedents, but erroneously lowers the bar for officer liability and disregards settled principles of qualified immunity.

A. The Decision Below Conflicts with Circuit Decisions That Reject Liability for Law-Enforcement Officers' Mere Failure to Diagnose and Communicate Suicide Information

1. Other Circuit Decisions Have Held That Officers' Failure to Diagnose and Report Suicidal Tendencies Does Not Amount to Deliberate Indifference

Other federal circuit decisions have held that, as a matter of law, officers' failure to diagnose and share medical information potentially relevant to a detainee's suicide is not deliberate indifference, but at most negligence. Those holdings conflict with the decision below.

The Third Circuit has repeatedly rejected § 1983 liability for failure to pass on information about a detainee's past suicide attempts and tendencies. In *Freedman* v. *City of Allentown*, Freedman's probation officer knew that Freedman had attempted suicide and had "suicidal tendencies." 853 F.2d 1111, 1113 (3d Cir. 1998). He spoke with a police detective who was questioning Freedman at the police station, but failed to mention the risk of suicide. *Id.* at 1111, 1113, 1117. An hour after his arrest, Freedman committed suicide. *Id.* at 1113.

Nevertheless, the court affirmed the dismissal of the § 1983 complaint. Though the complaint alleged that the probation officer's failure to relay the information was intentional, the court found no evidence of intent to conceal Freedman's past suicidal tendencies. *Id.* at 1113, 1117. While the probation officer may well have been negligent, the court ruled that his failure to pass along the information about Freedman's suicide attempt and tendencies did not amount to deliberate indifference. *Id.* at 1117.

Likewise, in *Williams* v. *Borough of West Chester*, the court found no liability when a dispatching officer failed to communicate information about a pretrial detainee's suicidal tendencies. 891 F.2d 458, 466-67 (3d Cir. 1989). Williams was jailed at the police station. The dispatching officer there knew that

Williams had threatened and attempted suicide several times; but the officer never communicated that information to anyone else. *Id.* at 462-63. Less than an hour after being put in a cell, Williams committed suicide. *Id.* at 462. Citing *Freedman*, the Third Circuit granted summary judgment for the dispatcher on a § 1983 claim. "[E]ven though [the dispatching officer] knew of [Williams's] past suicide attempts," no reasonable jury could find that he was deliberately indifferent. *Id.* at 466-67.

Though its facts are not identical, an analogous First Circuit case likewise declined to hold an officer liable for failing to diagnose and report potential symptoms of suicidal tendencies, even though the detainee later committed suicide. In *Elliott* v. *Cheshire County*, an eighteen-year-old boy had attacked his mother and threatened his father with a corn sickle and a chainsaw. 940 F.2d 7, 9 (1st Cir. 1991). When the officer arrived on the scene, the mother told him about the boy's schizophrenia and troubled past. *Id.* The officer delivered the boy to the county house of corrections but told no one there of the mother's warnings. *Id.* The boy committed suicide, and his family sued under § 1983 "for failure to inform the booking officer of [the boy's] medical history." *Id.* at 9, 12. Nevertheless, the First Circuit affirmed summary judgment in favor of the officer. Even though the court had to draw all factual inferences favorable to the boy, it found no "reason to suspect" that the officer knew of a suicide risk. *Id.* at 12. The officer knew of the boy's schizophrenia and bizarre behavior, but he was not liable for failing to infer and warn jailers of facts suggesting that he needed close medical supervision.

2. The Decision Below Created a Circuit Conflict, Holding Officers Liable for Failing to Diagnose and Share Suicide Information with Jailers

If the Ninth Circuit had applied the First and Third Circuits' cautious approach to this case, it would have affirmed the district court's grant of summary judgment. Instead, the Ninth Circuit's decision below found that officers have a constitutional duty to diagnose and report suicidal tendencies to jailers. Without explanation, Judge Reinhardt's opinion asserted that "it is obvious that the transporting officer must report the [suicidal] incident to those who will next be responsible for her custody and safety." *Conn*, 591 F.3d at 1102, App. 45. That approach contradicts the First and Third Circuits' decisions discussed above.

B. The Ninth Circuit Erred by Relaxing the Deliberate-Indifference Standard to Include Mere Negligence and by Diluting the Protections of Qualified Immunity

In holding that the officers could be liable for failing to diagnose and report suicidal tendencies, the court below made two errors. First, it watered down the deliberate-indifference standard, holding officers liable for what was at most negligence. As this Court has held, an officer's failure to share information critical to an inmate's health and safety does not amount to deliberate indifference. Second, it held the officers potentially liable even though qualified immunity should have shielded them. The standard articulated in the decision below is novel, creating a new duty to share information. Novel legal standards are not clearly established law, and officers cannot be held liable in hindsight for failing to anticipate them.

1. Deliberate Indifference Requires More Than Careless Failure to Communicate Potentially Relevant Medical Information

This Court has repeatedly distinguished deliberate indifference from mere negligence or carelessness. *See, e.g.*, *Farmer*, 511 U.S. at 835; *Estelle*, 429 U.S. at 105-06. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize" violations of an inmate's right to receive treatment for serious medical needs. *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986). Deliberate indifference is a much more demanding standard than negligence.

More specifically, this Court has held that law-enforcement officers' mere failure to communicate falls well short of deliberate indifference. In *Davidson* v. *Cannon*, one inmate (McMillan) threatened to violently attack another (Davidson). 474 U.S. 344, 345

(1986). Davidson relayed a note about the threat to the assistant prison superintendent on a Friday. *Id.* The assistant superintendent "mistakenly believed that the situation was not particularly serious" and simply passed it on to a corrections sergeant. *Id.* at 345, 348. The corrections sergeant was told of the note's contents, left it on his desk unread, and forgot about the note. He left for the weekend without passing along the information or warning the officers on duty. *Id.* at 345. Not having been warned, the prison staff took no precautions, and McMillan attacked and seriously injured Davidson. *Id.*

Davidson sued the assistant superintendent and the sergeant under § 1983, claiming that the breakdown in communications violated the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. *Id.* at 346. This Court held that the officers' negligence fell far short of Eighth Amendment deliberate indifference or even the looser due process standard. "Respondents' lack of due care in this case led to serious injury, but that lack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Id.* at 347-48.

Like the assistant superintendent and corrections sergeant in *Davidson*, petitioners Ashton and Robertson arguably erred in not identifying Clustka's threats as serious and reporting them. They understandably saw Clustka as drunk, angry, and manipulative rather than suicidal. While their single instance of not passing along Clustka's threats to prison guards may perhaps have been negligent, under *Davidson* it falls far short of deliberate indifference. *See Freedman*, 853 F.2d at 1117 (relying on *Davidson* in holding that the failure to report information about suicidal tendencies could not rise to the level of deliberate indifference).

Indeed, this Court has emphasized that it is not enough that the official be on notice of a serious safety risk to a person and fail to prevent it. To be liable, an "official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference.*" *Farmer*, 511 U.S. at 837 (emphasis added). "[A]n official's failure to alleviate a significant risk that he should have perceived but did not" does not violate the Constitution. *Id.* at 838.

The Ninth Circuit's affirmance of potential liability is even more egregious for three reasons. First, there is no basis here to find either deliberate indifference to a known risk or causation. Second, the officers transferred Clustka to the Jail where, pursuant to standard procedure, a medical professional screened her for suicide risk. Third, she did not commit suicide until after a later rearrest and another medical screening. The Ninth Circuit has thus distorted the law under the Fourteenth Amendment and § 1983. This Court should redress the Ninth Circuit's aberrant decision.

2. Officers Ashton and Robertson Are Entitled to Qualified Immunity, As the Ninth Circuit's Novel Constitutional Duty Was Not Clearly Established Law at the Time

Government officials are immune from civil damages if they do not violate clearly established legal rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982). The right must have been clear enough at the time that a reasonable official would have understood that he was violating that right. *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Thus, circuit splits are relevant to assessing clarity and can prevent a rule from being clearly established. *Id.*; *United States* v. *Lanier*, 520 U.S. 259, 269 (1997).

In April 2005, officers had no clearly established constitutional duty to diagnose and report suicidal tendencies to jailers. The First and Third Circuits, in *Freedman*, *Williams*, and *Elliott*, had held to the contrary, finding the absence of reporting in those cases to be at most negligence. Even this Court in *Davidson* had held that failure to share information about a threat was a mere lack of due care, not actionable deliberate indifference. The case law gave petitioners no fair warning that their failure to report an isolated incident could subject them to monetary liability.

The Ninth Circuit erred in asserting, without citing any authority, that law-enforcement officers bore an "obvious" duty to report the seatbelt incident. It is not at all obvious. At least where officers are taking a detainee to a place where the detainee routinely will receive a medical evaluation, they reasonably can leave the inquiry into symptoms and diagnosis to the medical professional.

III. THE BOUNDS OF MUNICIPALITIES' AND OFFICERS' CONSTITUTIONAL DUTIES TO DETAINEES ARE IMPORTANT AND RECURRING QUESTIONS

A. These Issues Affect Thousands of Local Law-Enforcement Agencies

This case presents questions of great importance to law enforcement agencies throughout the nation. Cities, townships, and police officers are receiving mixed signals on whether their suicide-prevention efforts are constitutionally adequate. In some circuits, cities must create policies and programs to train officers to diagnose detainees' suicidal tendencies. In other circuits, cities are free to leave these complicated judgment calls to medical professionals. And while some circuits hold individual officers liable for failing to diagnose and report symptoms of suicidal tendencies, others do not. Twenty years after *Harris*, there are still "no clear constitutional guideposts for municipalities" or officers regarding their potential liability for failing to "diagnos[e] the symptoms of emotional illness" in detainees. *Harris*, 489 U.S. at

396-97 (O'Connor, J., concurring in relevant part and dissenting in part).

These circuit splits reflect a fundamental divide over cities' and towns' freedom to define law-enforcement officers' roles. As a result, thousands of law-enforcement agencies must choose between dramatically altering their suicide-prevention measures and risking § 1983 liability. Municipalities suffer further because they lack clear guidance from those circuits that obligate them to train and adopt policies. The case law is unclear on what kind of training is necessary, whether it must involve extensive psychological and medical instruction, and how far individual officers must go to diagnose detainees.

Officers are neither used to nor prepared for serious mental-health duties. They typically rely on psychiatrists, physicians, nurses, and social workers in jails and hospitals to handle these professional medical questions. Cities and police officers, struggling to determine their constitutional duties, would greatly benefit from this Court's resolution of these issues.

B. Guidance Is Especially Important Given the Frequency of Alcohol-Related Arrests

This Court's resolution is particularly important because police officers detain thousands of intoxicated people like Cluskta every day. In 2005, police officers arrested more than 7000 people each day for alcohol-related violations. *Sourcebook of Criminal Justice*

Statistics Online, tbl. 4.28.2005, *available at* http://www.albany.edu/sourcebook/pdf/t4282005.pdf. The total number of intoxicated arrestees was probably much higher, as many intoxicated persons are arrested for non-alcohol-related crimes.

Thus, officers constantly interact with intoxicated detainees like Clustka. Drunk arrestees are often belligerent or distraught at being arrested, but they rarely commit suicide. In 2005, less than one detainee per day, arrested for any crime, committed suicide while in jail. *Id.* tbl. 6.0012.2005, *available at* http://www.albany.edu/sourcebook/pdf/t600122005.pdf. The Ninth Circuit's ruling requires officers to determine each day which of more than 7000 intoxicated arrestees (and 38,000 total arrestees) have potentially suicidal symptoms that might result in a single suicide within that haystack. This Court should give police officers and municipalities clearer guidance on their medical and clinical duties to these arrestees, since these interactions occur every day.

IV. THIS CASE IS AN EXCELLENT VEHICLE

This case is an excellent vehicle for resolving the entrenched circuit splits over municipal and officer liability. The factual record is clean and essentially undisputed. Petitioners denied the alleged constitutional duties at every stage of the proceedings, arguing that Reno and its officers are entitled to leave these diagnoses to medical professionals. The opinions below explicitly debated these issues and squarely decided them. In particular, the Ninth Circuit's decision clearly held that the Constitution imposes specific suicide-detection and diagnosis obligations on cities and law-enforcement officers. These extensions of municipal and officer liability provoked an extensive dissent from denial of rehearing en banc by seven circuit judges. Moreover, this Court's resolution of the matter in favor of Reno and Officers Ashton and Robertson would determine the outcome in this case.

Doctrines of qualified immunity and municipal liability are designed not only to preclude money damages, but also to spare cities and officers the burden of litigation and trial. Thus, this Court has repeatedly reviewed denials of summary judgment in cases interpreting the scope of § 1983 and qualified immunity. *See, e.g., Scott* v. *Harris*, 550 U.S. 372, 376 n.2 (2007); *County of Sacramento* v. *Lewis*, 523 U.S. 833, 837-38 (1998); *Hunter* v. *Bryant*, 502 U.S. 224, 227-28 (1991) (noting that "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage of the litigation" (alteration in original) (internal citation omitted) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985))); *Mitchell*, 472 U.S. at 530 (holding that a "denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment").

On review of summary judgment, this Court can take the facts as given in the light most favorable to the non-movant. This posture eliminates factual disputes and focuses on issues of law. This case thus presents an ideal vehicle for determining cities' and officers' obligations to detect and diagnose suicidal tendencies in intoxicated detainees.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. In the alternative, it should summarily reverse the decision below and reinstate the district court's entry of summary judgment in favor of petitioners on all counts.

Respectfully submitted,

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL SUPREME
COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

JOHN J. KADLIC
Counsel of Record
DONALD L. CHRISTENSEN
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

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APPENDIX A

591 F.3d 1081 (9th Cir. 2010)

Charla CONN; Dustin Conn,
Plaintiffs-Appellants,
v.
CITY OF RENO; Ryan Ashton; David Robertson,
Defendants-Appellees.

No. 07-15572.

United States Court of Appeals,
Ninth Circuit.

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Terri Keyser-Cooper, Reno, NV, and Diane K. Vaillancourt, Santa Cruz, CA, for the plaintiffs-appellants.

John J. Kadlic, Reno City Attorney, Donald L. Christensen, Deputy City Attorney, Reno, NV, for the defendants-appellees.

Appeal from the United States District Court for the District of Nevada, Howard D. McKibben, District Judge, Presiding. D.C. No. Cv-05-00595-HDM.

Before MARY M. SCHROEDER, DOROTHY W. NELSON and STEPHEN REINHARDT, Circuit Judges.

ORDER

The majority opinion filed July 24, 2009, slip op. 9581, and appearing at 572 F.3d 1047 (9th Cir.2009), is hereby amended as follows:

> 1. Slip op. at 9611, line 7: replace <No such policy had been adopted and implemented as of April 26, 2005.> with <This is further evidence that as of April 26, 2006 no such policy had been adopted and implemented.>
>
> 2. Slip op. at 9611, line 8: after <This is further evidence that as of April 26, 2006 no such policy had been adopted and implemented.>, insert the following footnote: <The evidence of the new policy is admissible solely as evidence of the absence of an earlier policy and not for the purpose of proving negligence or culpable conduct of any kind. See Fed.R.Evid. 407.>

The panel has voted to deny the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied. No further petitions for rehearing may be filed.

Chief Judge KOZINSKI, with whom Judges O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN, BEA and IKUTA join, dissenting from the denial of rehearing en banc.

Until this opinion came along, police officers weren't required to serve as babysitters, psychiatrists or social workers, and judges didn't run suicide-prevention programs. Responsibility for preventing suicide rested with the individual and the family, not the state. But the panel has discovered that the Constitution demands a change in job description: Judges will henceforth micromanage the police, who in turn will serve as mental health professionals. The panel's reasoning has no stopping point, and our decision to let it stand threatens unprecedented judicial intervention in our local institutions.

At bottom, this case raises the question of whether the state has a legal (as opposed to moral) obligation to provide for the health of its citizens. We have repeatedly rejected the idea that such an obligation exists. *See, e.g., DeShaney v. Winnebago Cty. Dept. of Soc. Servs.,* 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). This is in part because the benevolent welfare state is in tension with our tradition of liberty and individual dignity: What the state provides for you, you do not provide for yourself, and as the sphere of public largesse grows, the realm of private initiative retreats. It also reflects a judgment that any redefinition of the role of the state should occur under the supervision of democratically elected officials, not unaccountable federal judges. States may obligate themselves, but they should not have novel duties thrust upon them by judicial fiat.

We have recognized an exception to this rule when the state places a person in jail, but that exception has been strictly limited by its rationale. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation it has imposed on his freedom to act on his own behalf." *DeShaney,* 489 U.S. at 200, 109 S.Ct. 998. A prisoner cannot feed or clothe himself, and he cannot get himself to a doctor; it is therefore incumbent on his keeper to do those things for him. *See, e.g., id.*; *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). And, because the state creates the prisoner's conditions of incarceration, the state has a duty not to purposefully create a risk of harm – for instance, by placing the prisoner in a cell with a person who intends to do him ill. *See, e.g., Farmer v. Brennan,* 511 U.S. 825, 832-33, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Apart from that rationale, there is no free-floating obligation to safeguard prisoners' health. Otherwise, the distinction between prisoners and non-prisoners would become illusory, and we would be forced to recognize a duty of care towards society as a whole.

The panel's opinion is significant because it cuts the state's obligation loose from this tether and creates novel duties to train and to report information that bear no relationship to the fact of incarceration. In the process, it strips the guts out of the deliberate indifference standard, as well as the requirement that plaintiffs show a violation of clearly established law to defeat qualified immunity. In the panel's hands, standards that are meant to limit liability to all but the most extreme cases become tools for imposing the policy preferences of unelected federal judges. This combination of errors amounts to a toxic recipe for judicial micromanagement of local institutions.

1. In a brief portion of the opinion that will nevertheless have far-reaching consequences, the panel finds the City of Reno potentially liable for failure "to train its officers in suicide prevention and the identification of suicide risks." *Conn v. City of Reno,* 572 F.3d 1047, 1063 (9th Cir.2009). To avoid liability under our federal Constitution, police departments throughout the Ninth Circuit must now transform their police officers into suicide prevention experts. This novel holding creates a clear inter-circuit split and is irreconcilable with the standard for liability fashioned by the Supreme Court in *City of Canton v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

When ordinary citizens go about their business, they are not monitored by experts in suicide prevention. If you or I waltz up to a government employee – perhaps a mail man, dog catcher or meter maid – and announce, "today's a good day to kill myself," the Constitution does not guarantee that our chosen confidant will be a Sigmund Freud or Jacques Lacan. If we want to see a psychiatrist, we have to go see a psychiatrist. We certainly don't have a right to expect that every public servant we encounter will be specially trained to cater to our mental health needs.

According to the panel, citizens who are arrested fall into a different and more rarified class. When Brenda Clustka announced her suicidal thoughts to the officers sent to arrest her, she had the right to an audience trained in "suicide prevention and the identification of suicide risks." *Conn,* 572 F.3d at 1063. Indeed, the failure to provide that audience was "the functional equivalent of a decision by the city itself to violate the Constitution." *Harris,* 489 U.S. at 395, 109 S.Ct. 1197 (O'Connor, J., concurring in part and dissenting in part). But why? What constitutional penumbra turns the bench of a paddy wagon into a psychoanalyst's couch?

Plaintiffs are not the first litigants to seek to impose such a novel and dangerous duty, but other courts have steadfastly rejected similar claims. *Manarite v. City of Springfield,* 957 F.2d 953, 959 (1st Cir.1992) (rejecting claim that city was liable for failing to provide "training and education . . . in suicide detection and prevention"); *Colburn v. Upper Darby Twp.,* 946 F.2d 1017, 1029-30 (3d Cir.1991) (rejecting claim that jail was liable because it "failed completely to formally train its staff in signs and symptoms of suicide," including "instruction to take all suicide threats seriously") (emphasis omitted); *Popham v. City of Talladega,* 908 F.2d 1561, 1564-65 (11th Cir.1990) (no liability for "failure to train jail personnel to screen detainees for suicidal tendencies"); *Burns v. City of*

Galveston, 905 F.2d 100, 104 (5th Cir.1990) (no liability for "[f]ailure to train police officers in screening procedures geared toward detection of detainees with suicidal tendencies"); *see also Harris*, 489 U.S. at 396-97, 109 S.Ct. 1197 (O'Connor, J., concurring in part and dissenting in part) ("The claim in this case – that police officers were inadequately trained in diagnosing the symptoms of emotional illness – falls far short of the kind of 'obvious' need for training that would support a finding of deliberate indifference. . . .").

What Clustka surely did have was a right of access to medical treatment; because Clustka could not take herself to the doctor, the city had an obligation to make psychiatric care available to her. *See Estelle*, 429 U.S. at 103, 97 S.Ct. 285. The city more than fulfilled that obligation. Right before her arrest, Clustka was evaluated by a team of medics. At intake, she was examined by a nurse who received annual training in suicide prevention. She was then held in a detoxification cell that was regularly monitored by jail staff and nurses. After discharge, she was arrested a second time and brought by police to an emergency room, where she was seen by a physician. And when she was arrested a third time, she was booked into the mental health unit of the jail, which is managed by a licensed social worker and staffed around the clock. When Clustka committed suicide, she was scheduled to meet with a psychiatric nurse later that day. And there is no reason to think that Clustka would have been denied additional care if she had requested it.

Other circuits have rejected claims that the Constitution requires the kind of routine intake screening that was provided by the City of Reno. *See Colburn*, 946 F.2d at 1029-30; *Popham*, 908 F.2d at 1564; *Burns*, 905 F.2d at 104. Rightly so: Such screening may be laudable, but it also provides a benefit that prisoners could not reasonably expect to receive if they had not been arrested. The measures taken by the city therefore went far beyond anything the Constitution could conceivably require.

Against the backdrop of the city's efforts, the panel's holding that the city could be found deliberately indifferent is remarkable. "[F]ar from demonstrating deliberate indifference to the mental health needs of . . . potentially suicidal detainees, . . . the policies implemented by the City [of Reno] demonstrate an effort to ensure the safety of persons like decedent." *Manarite*, 957 F.2d at 960; *see also Liebe v. Norton*, 157 F.3d 574, 579 (8th Cir.1998) ("[T]he County's policy cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides."). The panel isn't just saying that the city has to be aware of and take steps to address the problem of suicide. The city plainly did that, and more. The panel is saying that the act of employing professionals to examine and care for inmates' mental health won't suffice; the city has a duty to enlist police officers as trained suicide-prevention experts. And, more broadly, the city is obliged to run its suicide prevention program in whatever manner unelected federal judges think best.

This is precisely the kind of micromanagement of local law enforcement that the Supreme Court has instructed us to avoid. *See Harris*, 489 U.S. at 392, 109 S.Ct. 1197. The Court in *Harris* was clear that deliberate indifference means more than negligence, and that a high bar to liability is necessary to forestall "an endless exercise of second-guessing municipal employee-training programs" – both because federal judges are "illsuited" to such a role and because excessive judicial intervention would "implicate serious questions of federalism." *Id.*

As an example of conduct that might satisfy the deliberate indifference standard, the Court therefore pointed to a total abdication of constitutional responsibility: A city that armed its police but failed to train them in the use of deadly force. *Id.* at 390 n. 10, 109 S.Ct. 1197. This is hardly that kind of case. The city didn't fail to address the problem of inmate suicide; it failed to address the problem in the way my colleagues think best. If that is enough to give rise to liability, I can't imagine what local institution is safe from judicial meddling, or what if anything is left of our tradition of local self-government.

2. In another troubling portion of the opinion, the panel holds that clearly established law required the officers transporting Clustka to report any suicide threats made en route to jail. *Conn*, 572 F.3d at 1062. On that basis, the panel withholds qualified immunity. *Id.*

To see why the panel's holding is remarkable, consider the context in which these defendants acted. The officers did not take Clustka to the hospital after the events in question, but they did take her to a prison where they knew she would be seen upon arrival by a nurse trained in detecting and preventing suicide risks. They did not tell the nurse what Clustka said after being arrested, and the care that Clustka received may have been less effective as a result. But the officers did not withhold psychiatric care or actively interfere with Clustka's treatment. Their alleged fault was in failing to pass on information that would be relevant to routine psychiatric screening that the city should not be required to provide in the first place. The panel's denial of qualified immunity in these circumstances means that officers can no longer leave the treatment of medical issues to trained medical professionals. Instead, they must actively assist those professionals by providing any information potentially relevant to a diagnosis. I doubt such a duty exists, and I certainly don't think it exists under clearly established law.

Once again, if ordinary citizens threaten suicide in front of a government employee – be it a tax collector, tollbooth operator or member of the judiciary – they have no constitutional right to have those statements communicated to their families or their doctors. Our Constitution does not turn government officials into the eyes and ears of the American Medical Association. So why should it be any different for citizens lucky enough to go to jail? It's true that prisoners can't take themselves to the doctor, *Estelle*, 429 U.S. at 103, 97 S.Ct. 285, but the officers here took Clustka to a place where she was seen by a medical professional trained in suicide prevention. After the officers put Clustka in the same (or better) position than she occupied before she was arrested, what in our federal Constitution required anything more? I can't imagine any answer that would not apply with equal force to those of us not in jail.

Our prior cases have rightly declined to acknowledge such a duty to assist. In *Wood v. Housewright*, we rejected a prisoner's claim that prison officials violated his constitutional rights by failing to provide his medical records to medical professionals. 900 F.2d 1332, 1334 (9th Cir.1990). Judge Reinhardt argued in dissent that failure to provide information constitutes deliberate indifference because "treatment can . . . best be prescribed if records are available for review," *id.* at 1343 (Reinhardt, J., dissenting in part), just as he reasons today that, although Clustka received medical care, her diagnosis "was never made by someone who had all the requisite information about her psychological instability," *Conn*, 572 F.3d at 1060 (emphasis omitted). In *Wood*, a majority of the panel disagreed. *See* 900 F.2d at 1334 (Farris, J.); *id.* at 1336 (Hug, J., concurring). "Although Wood's treatment was not as prompt or efficient as a free citizen might hope to receive, Wood was given medical care at the prison that addressed his needs." *Id.* at 1334 (Farris, J.); *see also Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 525 (9th Cir.1999) (prison doctor's failure to take patient's medical history, although negligent, did not support finding of deliberate indifference). That was correct then, and it remains correct today.

Despite this contrary precedent from our own court, the panel reverses the district court's grant of qualified immunity. *Conn,* 572 F.3d at 1062. Of course, the cases the panel cites to show a violation of clearly established law demonstrate nothing of the kind. The only Ninth Circuit case, *Cabrales v. County of Los Angeles,* involved a claim for "medical understaffing at the jail," such that "psychiatric staff could only spend minutes per month with disturbed inmates." 864 F.2d 1454, 1461 (9th Cir.1988). And in *Colburn,* although a suicidal inmate was held in prison without any medical attention whatsoever (including no medical screening at intake), the Third Circuit found the officers *not* liable for their failure to provide access to medical care. 946 F.2d at 1025. Both cases are miles away from this one, and *Colburn* supports the defendants rather than the plaintiffs.

The closest case is *Cavalieri v. Shepard,* 321 F.3d 616 (7th Cir.2003), but it doesn't support the panel's conclusion either. In that case, a police officer assured an arrestee's mother that her son would not be left alone while in jail but failed to pass that information on to the son's custodians. *Id.* at 622. The Seventh Circuit emphasized that the mother might "have gone directly to the [jail] if she had known that [the officer] did not intend to inform anyone of their conversation." *Id.* By contrast, Clustka's family never asked these individual defendants for help, and they never promised to give it. The only obligation they incurred when they took Clustka into custody was to ensure that incarceration did not deprive her of the care that she otherwise could have obtained for herself. *See DeShaney,* 489 U.S. at 200, 109 S.Ct. 998. The officers fulfilled that obligation.

Cities and police should be entitled to assign responsibility for the treatment of mental illness to trained medical professionals; certainly, the Constitution should not forbid such a division of responsibility. But the panel holds to the contrary: From here on out, police must become active participants in the treatment of mental illness. And, unable to rely on the shield of qualified immunity, police will wait with trepidation to see what other novel duties courts shift onto their shoulders. This will exact a cost: As police devote time and energy to judicially-imposed obligations, they will have less time and attention to devote to preventing crime, protecting their own safety and avoiding other types of constitutional violations. These are precisely the kinds of trade-offs that should be evaluated by elected officials, and not by federal judges who lack expertise and local knowledge and who do not represent the people directly affected by such decisions.

3. In yet another alarming portion of the opinion, the panel holds that a jury could find that the officers' failure to relay information on April 26 was the actual and proximate cause of Clustka's suicide on April 28. *Conn,* 572 F.3d at 1058-62. The panel's lax approach to causation dismantles yet another barrier to judicial intervention in local affairs.

With respect to "actual" cause, we simply don't know what would have happened had the officers reported Clustka's statements to the jail. The prison's health services administrator testified that the intake nurse would have considered the statements along with "a variety of variables" when assessing Clustka's mental health needs. We therefore can't know whether Clustka would have received additional care, or whether that care would have been effective. The best the panel can say is that "Clustka's suicide *might* well have been prevented" by "intervention [that] would *likely* have occurred." *Id.* at 1060 (emphasis added). This falls far short of showing that, "but for" the officers' omission, Clustka would not have committed suicide. *White v. Roper,* 901 F.2d 1501, 1505 (9th Cir.1990).

As for proximate cause, any conceivable connection between the officers' omission and Clustka's suicide is far too attenuated to support liability. Two full days passed between Clustka's statements and her suicide. In the interim, Clustka was "served with a Temporary Protective Order ('TPO'), which her mother had earlier sought" and which "ordered Clustka to stay away from her mother's residence." *Conn,* 572 F.3d at 1053. Clustka was also arrested twice, at least once because her own mother called police, rather than a doctor, "to report that Clustka was causing a disturbance." *Id.* And her mother wasn't the only one who passed up a chance to keep Clustka from taking her life. Clustka was taken to the hospital, where she was examined by a physician and then released. And she was seen by two intake nurses trained in suicide prevention.

The requirement of causation – like the deliberate indifference standard and the doctrine of qualified immunity – limits the ability of judges to micromanage local institutions. *See Harris,* 489 U.S. at 391-92, 109 S.Ct. 1197. So long as they are limited to errors that actually caused plaintiffs' injuries, judges sit to decide concrete cases and do not superintend entire programs and institutions. But, if judges can draw attenuated causal connections of the sort at issue in this case, they can expand their authority to encompass a much larger sphere of activity. Any mistake by local officials, no matter how remote its consequences, will become a federal case, and no corner of local activity will remain beyond judicial authority. The Butterfly Effect becomes an engine for judicial intervention. This may appeal to federal judges, who undoubtedly believe they know how to run local law enforcement far better than police and local officials, but it should make everyone else very uncomfortable.

* * *

Untethered from the need to explain why the state should owe any affirmative obligations to its citizens, and unconstrained by qualified immunity, causation and the deliberate indifference standard, judges will henceforth be free to intrude on the most minute aspects of local decisionmaking. The

Constitution will have become a "'federal good government act' for municipalities," *Harris,* 489 U.S. at 396, 109 S.Ct. 1197 (O'Connor, J., concurring in part and dissenting in part), and little will be left of our tradition of local self-government. Second-guessing suicide-prevention measures designed by local officials, and turning police into psychiatrists' assistants, will be just the beginning of this brave new world of rule by judiciary. This is a sweeping and dangerous precedent, and we severely undermine the autonomy of local governments by failing to correct the error through our en banc process.

OPINION

REINHARDT, Circuit Judge:

This story has no happy ending, and it was unhappy long before the events in question transpired. For years before she ultimately committed suicide in the Washoe County Jail, Brenda Clustka ("Clustka") struggled with alcohol abuse and serious mental health problems, including suicidal ideation. The longevity of her struggle and the persistence of her problems, however, do not absolve the defendants if they were deliberately indifferent to her serious medical need and as a result played a causal role in her death.

While transporting Clustka to civil protective custody, two Reno police officers witnessed her wrap a seatbelt around her neck in an apparent attempt to choke herself and then scream that they should kill her or else she would kill herself. The officers failed to report the incident to jail personnel or take her to a hospital. Clustka was released from protective custody a few hours later. The next day, she was again detained on a misdemeanor charge. During this second detention, less than 48 hours after the suicide threats, Clustka hanged herself in her cell.

When an individual is taken into custody and thereby deprived of her liberty, the officials who hold her against her will are constitutionally obligated to respond if a serious medical need should arise. If, with deliberate indifference, these officials fail to respond appropriately and instead act in a manner that will foreseeably result in harm, they violate her due process rights. The same is true when a municipality, with deliberate indifference, fails to train its law enforcement officers or fails to adopt and implement policies when it is highly predictable that such inaction will result in constitutional violations.

We hold that, on the facts presented, a reasonable jury could find that the defendant police officers are liable under 42 U.S.C. § 1983 for their deliberate indifference to Clustka's serious medical need, and that their actions were a cause in fact and a proximate cause of her suicide. Likewise, a jury could find the City of Reno liable for its failure to train its law enforcement officers or to implement policies on suicide prevention and reporting. For these reasons, and as explained further below, we reverse the district court's grant of summary judgment in favor of the defendants and allow Clustka's surviving children to bring their claims before a jury.

I. BACKGROUND

A.

Petitioners Charla and Dustin Conn ("the Conns") are the surviving children of Brenda Clustka, who committed suicide on April 28, 2005 while in custody and awaiting trial at the Washoe County Jail.

Clustka had long struggled with mental health problems and suicidal ideation. She also had a history of repeated encounters with the law: she had multiple misdemeanor convictions, including for domestic violence, larceny, and driving under the influence. Between 2001 and 2004, Clustka was involuntarily committed to the Nevada Mental Health Institute ("NMHI") on three separate occasions under a Legal 2000[1] for threatening or attempting suicide. Her mental health further deteriorated in 2005.

On March 19, 2005, Clustka was arrested for domestic battery of her mother. Officer Ashton ("Ashton"), one of the defendants in this case, was present during the arrest. Once in custody, Clustka stated that she "[wouldn't] make it in jail" and was placed on prison suicide watch. She was detained for just over one month and released on April 21, 2005.

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[1] A Legal 2000 is a procedure under Nevada law whereby people suffering from mental illness or who may be a danger to themselves or others may be involuntarily committed to a mental health facility for up to 72 hours.

A few days later, on April 25, 2005, Clustka relapsed into suicidal ideation. She was taken to Washoe Medical Center where she threatened to commit suicide in the emergency room by overdosing on her medication. Clustka was evaluated as suffering from "acute suicidal ideation" and transferred to NMHI on a Legal 2000. Her NMHI intake assessment states that she was at "serious risk of harm." At 9:06 a.m. the next morning, however, Clustka was medically evaluated and released. According to the evaluating doctor, Clustka denied that she had any suicidal thoughts; she said she was "feeling 'tired' but otherwise well" and was assessed to be only at a "low risk of harm" at the time of discharge.

Several hours later on April 26, 2005, at 2:43 p.m., Ashton and his co-defendant, Officer Robertson ("Robertson"), were dispatched in response to a 911 call, which reported that someone, who turned out to be Clustka, was passed out on the sidewalk. The officers found Clustka in a "grossly intoxicated" state; she "had a difficult time walking without assistance." Ashton, who had been one of the arresting officers handling the domestic battery call a month earlier, recognized Clustka on sight. The officers decided to take Clustka to Washoe County Jail on Civil Protective Custody ("CPC") for her own safety until she sobered up. They ran a "wants and warrants check" and were cautioned of Clustka's "violent tendencies, [that she was] known to abuse drugs, [was an] alcoholic [and had] other mental health problems." Ashton admitted that he was aware of Clustka's violent tendencies and mental health problems; nevertheless, the defendants chose not to handcuff her because she was being detained for her own protection, not on a criminal charge.

Clustka did not want to be taken to jail; she became agitated and uncooperative when told where she was going. Robertson then told Clustka, falsely, that they would take her, instead, to her residence. Robertson testified that he lied because Clustka was belligerent, and because he wanted to cajole her into the paddy wagon cooperatively, which he succeeded in doing.

En route to the jail, with her hands free, Clustka removed her seatbelt. She began walking around the back of the paddy wagon and tapping on the video surveillance camera to get the officers' attention. According to Ashton, he asked Robertson if they should pull over to secure Clustka in her seat, but Robertson decided against it, as they were near the jail and he wanted to avoid any further confrontation. Both officers believed that there was a Reno Police Department policy and a state law requiring the wearing of seatbelts.

As they neared the jail, Clustka realized where she was being taken and became angry, belligerent, and uncooperative. As Ashton observed her through the surveillance camera, Clustka returned to her seat and wrapped the seatbelt around her neck, in an apparent attempt to choke herself. The officers pulled over, unwrapped the seatbelt from her neck, and handcuffed her. Clustka was screaming as they did so. She yelled something to the effect of, "You lied to me. Just kill me. I'll kill myself then."

Both Ashton and Robertson testified that they interpreted Clustka's words and actions as a mere attempt to get their attention and "to manipulate the situation," and that they did not believe Clustka's threats to be serious. However, Ashton admitted that he did not believe that wrapping the seatbelt around her neck was a "joke." Ashton, who had been on the police force for only seven months, remembered asking Robertson, a nearly eighteen-year veteran, whether he should write up a report on the incident, but that Robertson said no. Robertson testified that he "told [Ashton] if he wanted to report it, he could report it." Ashton testified that he was unaware of any written policy mandating the reporting of such incidents.

When they arrived with Clustka at the jail, neither defendant notified jail personnel that Clustka had tried to choke herself or that she had threatened to commit suicide. Instead, Ashton told jail personnel that Clustka was disoriented. The defendants did not write a report nor inform their supervising sergeant about the incident that day. Both asserted that it did not occur to them to report it.

Upon arrival at the jail, Clustka underwent a brief intake assessment, was held in CPC at the

Washoe County Jail for nearly four hours, and was released without further inquiry around 8:00 p.m. Upon her release, she was served with a Temporary Protective Order ("TPO"), which her mother had earlier sought and obtained on account of domestic battery. The TPO ordered Clustka to stay away from her mother's residence, where she had been living, and to retrieve her personal belongings only in the company of police officers. There is no indication whether any other place was available where Clustka would be able to sleep.

That evening, notwithstanding the TPO, Clustka returned to her mother's house, and her mother called 911 to report that Clustka was causing a disturbance. Clustka, again grossly intoxicated, was taken to the emergency room, readmitted for observation, and released around 3:00 a.m.

The next day, on April 27, 2005, Clustka again returned to her mother's residence to collect her belongings and was arrested by two officers (not defendants) for violating the restraining order. She was returned to Washoe County Jail.

After Clustka was booked, she was medically screened by the nurse on duty and recommended for assignment to the general inmate population. Because Clustka had been on suicide watch during her previous detention in March, she was placed in the mental health unit in a red jumper to alert staff that she was a high risk detainee. She was not, however, placed on suicide watch at this time. As a result there was a bed sheet available in her cell.

The following morning, on April 28, 2005, Clustka was escorted to and from her video arraignment. On the way back from the arraignment, at 8:35 a.m., she became upset and started crying because she wanted to make a phone call. At 9:17 a.m., she did not respond to the roll call. A deputy went to check on her and immediately called a Code 50.[2] Clustka had committed suicide by hanging herself with the bed sheet.

The morning of Clustka's suicide, Ashton happened to be present at the Washoe County Jail on an unrelated matter. He recognized Clustka's photograph and told a prison deputy that "she tried to choke herself out in the back of the wagon on Tuesday." Ashton explained to another deputy that a few days earlier, he had transported Clustka to CPC – without handcuffs – and that "she tried to hang herself in the wagon." He stated that his more senior partner had declined to document the incident. Ashton said that he would now write up a report and predicted that his "sergeant will be pissed."

B.

From January 2004 through August 2005, six detainees in Washoe County Jail committed suicide.

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[2] Code 50 is a jail response when an inmate attempts suicide. Officers and medical personnel rush to the scene.

Clustka's suicide followed less than 30 days after that of another detainee.

On May 11, 2005, less than one month after Clustka's suicide, the Reno Police Department, apparently for the first time, presented a class on "handling the mentally ill" to better explain the Legal 2000 procedures. In May 2005, a new suicide prevention policy was implemented. At intake, the arresting officer must now answer a series of questions concerning the detainee's mental health, including questions about suicide risk. This policy was not adopted until after Clustka's death.

C.

After Clustka committed suicide, her surviving children, the Conns, filed suit in the District of Nevada under 42 U.S.C. § 1983. They sued Officers Robertson and Ashton for deliberate indifference to Clustka's serious medical need – her suicide risk – which, they alleged, resulted in her death. They also sued the City of Reno under § 1983 for, *inter alia*, its failure to train its law enforcement officers and to implement policies on suicide prevention and reporting. The district court found that the Conns had presented insufficient evidence to raise a genuine issue of material fact as to whether the officers were deliberately indifferent to a serious medical need by failing to report the choking incident and suicide threat and whether such failure to report was the proximate cause of Clustka's death. Consequently, the district court concluded that there was no basis on which a jury could find either individual liability or municipal liability and granted the defendants' motion for summary judgment. The Conns appeal, and we reverse.

II. STANDARD OF REVIEW

We review a grant of summary judgment by the district court de novo. *McDonald v. Sun Oil Co.*, 548 F.3d 774, 778 (9th Cir.2008). We examine all evidence in the light most favorable to the non-moving party, *id.;* Fed.R.Civ.P. 56, and "do[ ] not weigh the evidence or determine the truth of the matter, but only determine[ ] whether there is a genuine issue for trial," *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999) (en banc). "A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). If such is the case, "summary judgment will not lie." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

III. DISCUSSION

A. Individual Liability

The Eighth Amendment protects inmates from cruel and unusual punishment, which includes the denial of medical care. *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Pretrial detainees, by contrast, are protected under the Due

Process Clause of the Fourteenth Amendment. *Or. Advocacy Ctr. v. Mink,* 322 F.3d 1101, 1120 (9th Cir.2003). Although courts have borrowed from Eighth Amendment jurisprudence in giving shape to pretrial detainees' substantive due process rights, *see Frost v. Agnos,* 152 F.3d 1124, 1128 (9th Cir.1998), that amendment establishes only "a *minimum standard of care,*" *Mink,* 322 F.3d at 1120 (emphasis in original).[3]

The Eighth and Fourteenth Amendments both guarantee that inmates and detainees receive constitutionally adequate medical and mental health care. *Doty v. County of Lassen,* 37 F.3d 540, 546 (9th Cir.1994). An official's deliberate indifference to a substantial risk of serious harm to an inmate – including the deprivation of a serious medical need – violates the Eighth Amendment, and a fortiori, the Fourteenth Amendment. *Farmer v. Brennan,* 511 U.S. 825, 828, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Frost,* 152 F.3d at 1128. To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment,

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[3] Because here, the Conns prevail under the Eighth Amendment deliberate indifference standard, we need not further explicate in this case the more lenient but more amorphous test under the Fourteenth Amendment that has been suggested by our case law. *See, e.g., City of Revere v. Mass. Gen. Hospital,* 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983); *Youngberg v. Romeo,* 457 U.S. 307, 321-22, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982); *Gibson v. County of Washoe,* 290 F.3d 1175, 1188 n. 9 (9th Cir.2002); *Mink,* 322 F.3d at 1120, 1121 n. 11; *Jones v. Blanas,* 393 F.3d 918, 934 (9th Cir.2004).

> [f]irst, the plaintiff must show a "serious medical need" by demonstrating that "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" Second, the plaintiff must show the defendant's response to the need was deliberately indifferent.

Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.2006) (internal citations omitted). The second prong requires both "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id.* Deliberate indifference thus requires an objective risk of harm *and* a subjective awareness of that harm. *Farmer,* 511 U.S. at 837, 114 S.Ct. 1970. We address these requirements – serious medical need, indifference to that need, and harm caused by that indifference – each in turn.

1. "Serious medical need"

We recognize that a prisoner has a "serious" medical need if the failure to treat the condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *Doty,* 37 F.3d at 546 (citing *McGuckin,* 974 F.2d at 1059). A heightened suicide risk or an attempted suicide is a serious medical need. *See id.* (citing *Torraco v. Maloney,* 923 F.2d 231, 235 & n. 4 (1st Cir.1991)); *see also Colburn* *v. Upper Darby Twp.*, 946 F.2d 1017, 1023 (3d Cir.1991) ("A 'particular vulnerability to suicide' represents a 'serious medical need.' ").

The district court did not decide whether summary judgment would be appropriate on the issue of serious medical need, although it commented that the evidence suggested that "Clustka's medical needs . . . were not objectively serious enough to find a 14th Amendment violation." We disagree. The Conns presented sufficient evidence of their mother's objective, serious medical need for a reasonable jury to find in their favor.

First, the significance of Clustka's medical evaluations around the time of the choking incident and suicide threat is disputed and presents a question for the jury. It is true that Clustka underwent several medical evaluations in the days before and after she tried to choke herself in the paddy wagon, and that only one of these evaluations found her to be at serious risk of harm. The defendants argue that, for this reason, the evaluations establish that Clustka did not present a serious health risk. Their interpretation, however, is not conclusive; rather, the conflict in the evaluations in itself raises a genuine issue of fact for the jury to resolve. Moreover, due to the police officers' failure to report the choking incident and suicide threat, Clustka's evaluators were unaware of those events when they assessed Clustka's mental health, and their conclusions were drawn in the absence of significant information that would have supported the Conns' position.

Second, Clustka's long and undisputed history of mental health problems, alcohol and substance abuse, and suicide threats and attempts – including suicidal ideation the day before the incident in the paddy wagon – supports the conclusion that the threat to Clustka's health was objectively serious, and that if untreated, she was likely to suffer further significant injury.

Third, the choking incident, accompanied by Clustka's threat to kill herself, constituted adequate objective evidence of a serious medical need. Although Ashton conceded that Clustka was not joking when she wrapped the seatbelt around her neck, the defendants attempt to minimize the seriousness of Clustka's situation by characterizing her threats as "manipulative" – as an attempt to catch the officers' attention and to avoid going to jail. The members of the jury, however, are entrusted with the responsibility to weigh the officers' interpretation of the events against other reasonable inferences more favorable to the plaintiffs. The events may appear differently to the jury than they purportedly did, in hindsight, to Ashton and Robertson. To the jury, that Clustka attempted to choke herself with a seatbelt and screamed at the defendants that they should kill her or she would kill herself may, by itself, be sufficient to establish her serious medical need. This is particularly so since the Conns presented evidence that suicide threats by detainees must *always* be taken seriously.

The defendants contend that, even if Clustka truly intended to harm herself, there was no genuine possibility that she would have succeeded in killing herself in the paddy wagon. The defendants argue, rather callously, that the seatbelt would have slackened if and when she passed out, and that Clustka was therefore at no real risk of dying. This, of course, is beside the point. Whether Clustka's life was in danger en route to the jail does not affect the more important question whether Clustka was at a heightened risk of killing herself in the near future, as she ultimately did – a heightened risk that itself presents a serious medical need. It is not necessary, moreover, that a serious medical need imminently result in death – an attempted suicide is sufficient. *See Doty,* 37 F.3d at 546 (citing *Torraco,* 923 F.2d at 235 & n. 4).

An objective juror could certainly conclude that in light of all the circumstances Clustka's actions evidenced a serious medical need. The defendants' attempts to cast doubt on the gravity of Clustka's words and actions merely create a fact question for the jury to resolve. We conclude, therefore, that the Conns have raised a genuine issue of material fact as to the question of serious medical need.

2. "[D]efendant's response to the need was deliberately indifferent"

To demonstrate the second prong – deliberate indifference – plaintiffs must show that the officers were (a) *subjectively aware* of the serious medical need and (b) failed to adequately respond. *Farmer,* 511 U.S. at 828, 114 S.Ct. 1970.

a. Subjective awareness

To be liable under the Eighth Amendment for denial of medical treatment to a detainee, an official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer,* 511 U.S. at 834, 837, 114 S.Ct. 1970. In other words, the official must demonstrate a *subjective awareness* of the risk of harm.

Ashton and Robertson do not dispute that they witnessed Clustka wrapping a seatbelt around her neck and yelling that she wanted to die. Rather, they assert that they did not believe Clustka's actions to be a "serious" threat or attempt of suicide. Put in *Farmer's* terms, they contend that they did not "draw the inference," *id.,* that Clustka was genuinely at risk despite being "aware of facts from which the inference could be drawn," *id.* According to the officers, Clustka's actions seemed to them an attempt at manipulation. Once she realized that she was being transported to jail, Clustka tapped repeatedly on the surveillance camera to get the officers' attention but received no response. By wrapping the seatbelt around her neck, they explain, she was merely resorting to more dramatic measures to get the officers' attention, stop the paddy wagon, and avoid going to jail. The officers, moreover, recall discounting the seriousness of her actions on account of her state of intoxication. They also argue that Clustka could not have succeeded in killing herself because the seatbelt would have slackened around her neck once she passed out, thus her threat of suicide could not have been serious.

We may not affirm the district court's grant of the defendants' motion for summary judgment, however, simply on the basis of the defendants' assertions as to their own state of mind. Proof of "subjective awareness" is not limited to the purported recollections of the individuals involved. "Whether [an] official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer,* 511 U.S. at 842, 114 S.Ct. 1970. Indeed, in certain circumstances, "a factfinder may conclude that [an] official knew of a substantial risk from the very fact that the risk was obvious." *Id.* (internal quotations omitted). Here, there is sufficient circumstantial evidence to create a genuine issue of fact regarding defendants' subjective awareness of Clustka's serious medical need.

First, the Conns have presented evidence from which the jury could conclude that Clustka's medical need was so obvious that Ashton and Robertson must have been subjectively aware of it, despite their later denial of that awareness. Clustka attempted to choke herself with a seat belt and screamed something to the effect of "kill me or I'll kill myself"; these are warning signs that are difficult for any observer to miss. The officers, moreover, admittedly knew that Clustka was mentally unstable and that she was undergoing a particularly stressful time. Clustka's detail report – which the officers requested and reviewed – cautioned: "violent tendencies, known to abuse substances, alcoholic, and other mental health problems." The report also indicated that Clustka's mother had obtained a restraining order against her. A reasonable jury could conclude that the officers' knowledge of Clustka's mental and emotional instability, coupled with their observation of her dangerous behavior, in fact produced a subjective awareness that Clustka was at acute risk of harm and suffered a serious medical need.

Second, the Conns offer circumstantial evidence to explain *why* the officers might have failed to report the incident even if they were subjectively aware of Clustka's medical need. Both officers believed that failing to handcuff Clustka while transporting her, and failing to fasten her into her seat belt once she unbuckled it, were violations of policy.[4] Had they reported the incident, they would have had to report their own misconduct. A jury could reasonably conclude that the officers had a motive for remaining silent.

Finally, Ashton's comments both during and after the incident in the paddy wagon establish a genuine question of fact regarding his subjective awareness of the seriousness of Clustka's condition – as well as his discomfort with the way in which he and Robertson handled the situation. Ashton recalls telling Robertson at the time of the incident that Clustka "was trying to choke herself." The next day – the day before Clustka committed suicide – Ashton approached a senior officer expressing his discomfort with what had transpired. Later, when Ashton found out about Clustka's suicide, he told one deputy that Clustka had "attempted to choke herself" in the paddy wagon. A second deputy reported the following conversation:

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[4] It appears that this belief was not well-founded, and that the defendants may not have violated policy after all. That, however, is irrelevant; what matters is that the officers *believed* their actions violated policy and that they may have *feared* that the policy violation would be discovered.

> [Ashton] stated that "she looked out the back window and once she realized she was coming to Parr [the prison] she *tried to hang herself in the wagon*." He stated that he was "new" and therefore asked his (unidentified) partner and senior officer if they needed to write a report regarding *the suicide attempt*. He stated that his partner declined the idea of documenting this occurrence, therefore he did not.

(emphasis supplied). Ashton went on to say that he would write a report and that his "sergeant will be pissed." These statements – both contemporaneous and after-the-fact – could support a reasonable jury's conclusion that Ashton, at least, was subjectively aware of Clustka's serious medical need. That he brought his concerns to Robertson's attention is a factor to consider with respect to whether Robertson was also subjectively aware of the problem.

We hold that, cumulatively, the above evidence is sufficient to create a material issue of fact on the question of the subjective awareness of both officers. This is particularly so because "questions involving a person's state of mind are generally factual issues inappropriate for resolution by summary judgment." *Mendocino Envtl. Ctr. v. Mendocino County,* 192 F.3d 1283, 1302 (9th Cir.1999) (quotation and internal alterations omitted). We, of course, "may not make credibility determinations or weigh conflicting evidence." *Bator v. Hawaii,* 39 F.3d 1021, 1026 (9th Cir.1994). We must leave the question of subjective awareness to the jury.

b. "Failure to respond"

The officers did not take Clustka to the Medical Center, nor did they report her behavior to jail personnel or to their supervising sergeant; they did not even write an incident report on the day that Clustka tried to choke herself. The defendants do not argue that, if we find that the officers *were* subjectively aware of Clustka's serious medical need, they nonetheless responded appropriately. The defendants are not, therefore, entitled to summary judgment on the ground that the officers responded adequately to the situation presented.

3. "[H]arm caused by the indifference"

The question of causation is closer. We are satisfied, nonetheless, that the Conns presented sufficient evidence of actual and proximate causation to defeat summary judgment and give rise to a jury question whether the officers' omissions caused Clustka's eventual suicide.

a. Cause in fact

The officers' failure to report the choking incident and suicide threat "is the actual cause of [the] injury only if the injury would not have occurred 'but for' that conduct." *White v. Roper*, 901 F.2d 1501, 1505 (9th Cir.1990) (citing W. Prosser & W. Keeton, *The Law of Torts* [hereinafter "Prosser & Keeton"] § 41, at 266 (5th ed.1984)). "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir.1978). The Conns contend that had the officers responded appropriately to her attempted choking and suicide threat, Clustka would not have committed suicide at the time she did and that the officers' failure to respond set in motion a sequence of events in which Clustka did not receive the medical treatment she urgently needed. We agree that the Conns have presented sufficient material evidence on cause in fact such that a jury could reasonably find in their favor.

The Conns argue that, had the officers properly responded to the choking incident and threat of suicide in either of two ways, they would have prevented her suicide less than 48 hours later. In support of this assertion, they presented expert testimony to establish the appropriate procedures for handling detainees who threaten suicide-procedures that were not followed here. Based on this testimony, the Conns assert that first, the officers could have properly taken Clustka directly to the hospital under a Legal 2000 procedure and reported the incident to hospital staff. Second, the officers could have continued on to the jail and reported the incident to jail personnel upon their arrival. At that point, jail personnel would have either (1) rejected Clustka at the door and sent her to the hospital, since the jail cannot provide medical treatment during civil protective custody; or (2) admitted her and placed her under suicide watch until she was detoxified, then evaluated her and sent her to the hospital under a Legal 2000. According to the plaintiffs, under either of these procedures Clustka would have received timely suicide intervention services by trained medical personnel who had full information about her most recent suicide attempt. At this point, she would have been kept in the hospital for up to 72 hours or would have, in some other way, received appropriate services in response to her acute risk of suicide.

Defendants counter that the outcome of either of these procedures "amount[s] to mere speculation." They point to the fact that on two occasions, including on April 26, Clustka was evaluated at the emergency room and released soon thereafter without being transferred to a psychiatric facility. On three occasions between 2001 and 2005 when Clustka *was* transferred to NMHI, she did not stay there longer than a day. Defendants note that each time a patient is seen at the emergency room, the medical evaluation is based solely on the patient's psychological state at that moment. Because Clustka did not physically harm herself while in CPC on April 26, there is reason to think that she was no longer suicidal at the moment she was released. Consequently, had she been evaluated by medical staff at the prison or hospital at that time, even had the medical staff been fully informed of the choking incident and suicide threat, she may well have been released from the jail or from the emergency room without further intervention. Finally, defendants argue that even if the officers had notified jail or hospital personnel of Clustka's actions and she had been flagged as a suicide risk, if she had been released on April 26 (from either CPC or the emergency room), the information about the choking incident and suicide threat would not have been passed along to the jail intake personnel when Clustka was detained the next day on the misdemeanor charge; therefore, she would not have been put on suicide watch or treated any differently than she was.[5] The jail keeps minimal documentation

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[5] The jail already *was* aware that a month earlier, Clustka had been put on suicide watch at the prison and that she had a history of mental health problems. For that reason she was placed in the mental health unit. Nonetheless, without the

(Continued on following page)

regarding CPC detainees – apparently for privacy reasons – since these detainees have not been charged with a crime and are merely in custody for their own protection. As a result, there is an information gap between CPC and the criminal detention facilities at the jail, and mental health information about CPC detainees will generally be inaccessible if those individuals are later detained on a criminal charge. When, after being released on April 26, Clustka was picked up the next day on a misdemeanor charge, unless the same intake nurse was on duty as on the day before, it is likely that no one at the jail would have known that she had been flagged as a suicide risk in CPC the previous day, and her treatment would have been no different.

When presented to the jury, the defendants' argument may well succeed. It is not, however, sufficient to warrant judicial determination of causation as a matter of law. The defendants' argument rests on the questionable assumption that knowledge of Clustka's second suicide threat in two days, if reported upon her arrival at the jail or at a hospital, would not have raised an alarm for medical personnel such that Clustka would have received more precautionary treatment than she otherwise did. It presupposes, moreover, that any such treatment would have been ineffective and that, regardless, the subsequent events

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information about her most recent suicide attempt/threat, she was not placed on suicide watch on April 27, 2005.

would have occurred when they did. It makes little sense, however, to argue that the failure to provide access to suicide prevention services has no causal effect on a suicide that transpires less than 48 hours later. If suicide intervention is expected to have no impact on whether someone attempts suicide, why would the City ever bother with the Legal 2000 procedure? Suicide prevention services are designed to assess the patient and release her *only* after a determination that she is no longer at risk. In Clustka's case, this determination *was never made by someone who had all the requisite information about her psychological instability at the time*. A jury could reasonably find that the defendants' failure to report critical information rendered the subsequent medical evaluations ineffectual. Clustka's suicide might well have been prevented by effective medical intervention – such as holding her on a Legal 2000 for up to 72 hours – but that intervention would likely have occurred only if the crucial information about the choking incident and suicide threat were known by the persons making the necessary determinations.

We cannot affirm the grant of a motion for summary judgment where, as here, each side has garnered substantial evidence in support of its position, and important facts, including the proper intake procedures for an intoxicated, suicidal detainee, remain in dispute. The Conns have presented evidence that knowledge of Clustka's suicide attempt and threat of future suicide would have made a difference in her medical evaluation, treatment and supervision.

We construe that evidence in the light most favorable to the Conns. *McDonald,* 548 F.3d at 778. There need only be "evidence in the record to support the inference that if medical staff had evaluated [Clustka], prevented [her] from entering the jail, and directed [her] to a mental hospital [Clustka] almost certainly would have received the care [s]he needed, rather than face conditions that worsened [her] outlook." *Gibson,* 290 F.3d at 1190. As the Conns have met their burden, we will leave the jury to its proper function of assessing the weight and credibility of that evidence as well as that presented by the defendants. *See Bator,* 39 F.3d at 1026.

b. Proximate cause

"Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for the injury." *White,* 901 F.2d at 1506 (citing Prosser & Keaton, § 42 at 272-73). The officers' conduct "is not the proximate cause of [Clustka's] alleged injuries if another cause intervenes and supersedes [their] liability for the subsequent events." *Id.* (quoting Restatement (Second) of Torts §§ 440-53 (1965)). However. "*foreseeable* intervening causes . . . will not supersede the defendant's responsibility." *Id.* (citing Prosser & Keeton, § 44 at 303-04) (emphasis added). If "reasonable persons could differ" over the question of foreseeability, "summary judgment is inappropriate and the question should be left to the jury." *Id.*

Where defendant's actions are a "moving force" behind a series of events that ultimately lead to a foreseeable harm, defendant is not relieved of liability on account of the intervening acts. *See id; see also Duffy,* 588 F.2d at 743; *Cabrales v. County of Los Angeles,* 864 F.2d 1454 (9th Cir.1988), *vacated,* 490 U.S. 1087, 109 S.Ct. 2425, 104 L.Ed.2d 982 (1989), *reinstated,* 886 F.2d 235 (9th Cir.1989). In *White,* defendant prison guards tried to force the plaintiff into a violent inmate's cell; the plaintiff resisted, attempted to run, and subsequently suffered injury from the guards. 901 F.2d at 1503. We held that the defendants' actions were a "moving force" behind the plaintiff's attempt to run and that, because it was foreseeable that the plaintiff would resist entering the cell, his attempt to run was not an intervening cause. *Id.* at 1505-06. In *Cabrales,* which involves municipal rather than individual liability, an inmate made a suicidal gesture while in isolation, after which prison officials released him to the general jail population. *Cabrales,* 864 F.2d at 1457. Subsequently, he got into a fight and was subjected to ten days in isolation, during which time he committed suicide. *Id.* We held that the County's inadequate provision of psychiatric care was a "moving force" behind the suicide. *Id.* at 1461. Similarly, a jury could reasonably find that the officers' failure to respond to Clustka's suicidal actions was a "moving force" behind her suicide.

Defendants argue that two principal intervening causes of Clustka's suicide supersede whatever responsibility they might otherwise have had for causing her death. First, they argue that because Clustka was medically evaluated three times after the choking incident and suicide threat and each time determined not to be at risk of suicide, her suicide could not have been caused by the officers' failure to report it. We disagree. At none of the three examinations, two of which were cursory jail admission screenings, was potential suicide a cause for or the subject of the review. When medical examiners have insufficient information about the patient they are diagnosing, they are likely to give an inaccurate diagnosis. By failing to report Clustka's choking and threat of suicide, the officers rendered these reviews of little value. More important, by doing so, they foreseeably undermined her access to effective medical evaluations and adequate mental health care. A jury could reasonably conclude that notwithstanding the subsequent uninformed medical reviews, the failure to take action following the incident in the paddy wagon was a moving force and proximate cause of Clustka's suicide.

Second, defendants argue that Clustka's subsequent arrest and detention on a misdemeanor charge was an intervening stressor that directly caused the suicide, breaking the chain of causation. Again, however, plaintiffs have presented sufficient material evidence to raise a jury question on the issue of foreseeability. Even if she had not been detained again, it was clear from the officers' direct observations of Clustka and from her detail report that she was mentally unstable, that she suffered from alcohol and substance abuse, and that she was having family troubles that exacerbated these problems. In these circumstances, an incident that would further destabilize her – whether detention or some other similar intervening force – was entirely foreseeable.

Construing all the evidence in the light most favorable to the Conns, *McDonald,* 548 F.3d at 778, we conclude that they have presented sufficient evidence of foreseeability that the question of proximate cause must be decided by a jury.

B. Qualified immunity

We next assess whether summary judgment is warranted because the defendants are entitled to qualified immunity. We apply a two-part inquiry: First, did the defendants' actions violate the Constitution? Second, if so, was the right violated clearly established? *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Pearson v. Callahan,* ___ U.S. ___, ___, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (holding the "sequence set forth [in *Saucier*] is often appropriate" but not mandatory). Having determined that there is a question for the jury on the first prong, we consider whether we should nonetheless affirm the grant of summary judgment at this stage because the constitutional rights at issue have not been clearly established. This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition. . . ."

Saucier, 533 U.S. at 201, 121 S.Ct. 2151. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. Officers are entitled to qualified immunity if they reasonably misapprehend how the law would govern in their particular situation. *Id* at 205, 121 S.Ct. 2151.

Qualified immunity is not warranted here. It is clearly established that the Eighth Amendment protects against deliberate indifference to a detainee's serious risk of suicide. *See Cabrales,* 864 F.2d 1454; *Cavalieri v. Shepard,* 321 F.3d 616, 621 (7th Cir.2003); *Colburn,* 946 F.2d at 1023. When a detainee attempts or threatens suicide en route to jail, it is obvious that the transporting officers must report the incident to those who will next be responsible for her custody and safety. Thus, the constitutional right at issue here has been clearly established. Nevertheless, for the same reason that we cannot determine at summary judgment whether a constitutional violation occurred, a grant of summary judgment to either party with regard to qualified immunity would be inappropriate.

C. Municipal liability

Under *Monell,* a municipality is a legal "person" subject to liability under § 1983 for injuries it inflicts through deliberate indifference. *Monell v. Dep't of*

Social Servs. of City of N.Y., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Municipal liability may be established on account of the city's deliberate acts or omissions; liability under the theory of respondeat superior, however, is insufficient to support a § 1983 violation. *Id.* at 691, 98 S.Ct. 2018; *Gibson*, 290 F.3d at 1185-86. Municipal liability for a failure to act requires a showing "(1) that a [municipal] employee violated the plaintiff's constitutional rights; (2) that the [municipality] has customs or policies that amount to deliberate indifference; and (3) that these customs or policies were the moving force behind the employee's violation of constitutional rights." *Long v. County of L.A.*, 442 F.3d 1178, 1186 (9th Cir.2006) (citing *Gibson*, 290 F.3d at 1193-94). Because we have denied the defendants' motion for summary judgment on the constitutional claims against Robertson and Ashton, the first prong has been met for the purposes of summary judgment here as well.

The Conns seek to establish municipal liability on account of four separate omissions: (1) failure to train; (2) failure to adopt and implement policies; (3) failure to address Officer Robertson's deficient performance; and (4) failure to discipline. We consider each of these claims in turn.

1. Failure to Train

"Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983." *City of*

Canton v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Deliberate indifference by the municipality may be established where "a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Long,* 442 F.3d at 1186 (quoting *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 409, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997)).

Under this standard, the Conns have established a genuine issue of fact for the jury on the question of the City of Reno's failure to train. First, they have provided substantial evidence in the form of deposition testimony that before Clustka's suicide the City did, in fact, fail to train its officers in suicide prevention and the identification of suicide risks. The City of Reno has not provided any evidence to the contrary.

Second, plaintiffs have provided evidence that officers predictably face situations where they must assess and react to suicide risks in order to prevent grave harm to people under their protection. Suicide is a leading cause of death in American prisons, Shevon L. Scarafile, *"Deliberate Indifference" or Not,* 51 Vill. L.Rev. 1133, 1133-34 & n.4 (2006), and Clustka's suicide was one of six in less than two years at the Washoe County Jail. While police officers are not prison guards, they are the first law enforcement officials to deal with detainees – and they do so in highly stressful situations. Robertson testified that over the course of his career, he has encountered between 500 and 1,000 people threatening to kill themselves. Police officers frequently take mentally ill detainees to the hospital on Legal 2000s. The failure to train officers on how to identify and when to report suicide risks produces a "highly predictable consequence": that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue.

Finally, plaintiffs have made an adequate showing that, had the City trained its officers, the violation of Clustka's constitutional rights could have been avoided. For a policy to be a moving force behind the violation of a constitutional right, the failure of the policy or omission must be "closely related to the ultimate injury." *Gibson*, 290 F.3d at 1196 (quoting *Canton*, 489 U.S. at 391, 109 S.Ct. 1197). Here, Robertson and Ashton believed that they had the discretion not to report the choking incident and suicide threat in the paddy wagon. Had they been trained in suicide prevention, there is a reasonable probability that they would have responded differently and reported to the jail that Clustka was at risk of suicide, or taken her directly to the hospital.

For these reasons, plaintiffs have presented sufficient evidence to establish a genuine issue of fact with respect to municipal liability for failure to train. Because the City failed to train its police officers in suicide prevention, a reasonable jury could find that the City's "customs or policies . . . amount to deliberate indifference;" and because Ashton and Robertson, who never received such training, failed to respond appropriately by reporting the incident in the paddy wagon, there is sufficient evidence for a reasonable jury to find "that these customs or policies were the moving force behind the employee[s'] violation of constitutional rights." *Long*, 442 F.3d at 1186. "[W]hether a local government has displayed a policy of deliberate indifference to the constitutional rights of its citizens is generally a jury question." *Gibson*, 290 F.3d at 1194-95. We are compelled to deny the motion for summary judgment on municipal liability for failure to train.

2. Failure to Adopt and Implement Policies

Plaintiffs also challenge the lack of an official, written policy on suicide prevention. "This Court consistently has found that a county's lack of affirmative policies or procedures to guide employees can amount to deliberate indifference, even when the county had other general policies in place." *Long* 442 F.3d at 1189.

The Conns assert – and appear to be correct – that there was no written policy on reporting suicide threats at the time of Clustka's suicide,[6] although there were written policies regarding the Legal 2000 procedure. The absence of any written policy is supported by the fact that neither Robertson nor Ashton was disciplined for failing to report Clustka's suicide threat, although each received negative comments about the incident in their annual evaluation. Post-event evidence, such as this, is admissible to prove the absence of a municipal defendant's policy or practice. *Henry v. County of Shasta,* 132 F.3d 512, 520 (9th Cir.1997).

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[6] Deputy Chief Johns was "not sure" if there was a written policy requiring officers to report suicide threats.

Shortly after Clustka's suicide, moreover, the City implemented a new suicide prevention policy. At intake in the jail, the arresting officer must now fill out a form answering a series of questions concerning the detainee's mental health, including questions about suicide risk. This is further evidence that as of April 26, 2006 no such policy had been adopted and implemented.[7]

As the Conns have presented sufficient evidence of a failure to adopt and implement suicide-prevention policies so as to give rise to a jury question, the rest of our analysis mirrors that which we described above regarding the failure to train. Given the predictability of suicide risk among detainees, and the likelihood of constitutional violations if suicide threats go unreported, the plaintiffs have presented a genuine issue for the jury on whether the failure to adopt and implement policies on suicide prevention was deliberately indifferent, and whether that deliberate indifference was a "moving force" behind the violation of Clustka's constitutional rights.

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[7] The evidence of the new policy is admissible solely as evidence of the absence of an earlier policy and not for the purpose of proving negligence or culpable conduct of any kind. *See* Fed.R.Evid. 407.

3. Failure to address the deficient performance of Officer Robertson

Whatever Robertson's on-the-job weaknesses may have been, there is no evidence in the record that the municipality should have known – or did know – that Robertson would be likely to show deliberate indifference in circumstances such as these. Moreover, the causal link between the City's failure to address his deficient performance in other aspects of his job and his failure to respond appropriately here is tenuous at best. Accordingly, we affirm the grant of summary judgment on this issue.

4. Failure to discipline

Robertson and Ashton were not disciplined in any way for their misconduct in failing to report the choking incident and suicide threat. They each received some negative comments about their handling of the situation in their annual reports, written by their supervising sergeant.

A failure to discipline is not a separate ground for establishing municipal liability. Rather, it is evidence that tends to establish the absence of or failure to enforce a policy on suicide prevention. We will therefore affirm the district court's grant of summary judgment on this issue as well, without commenting on the admissibility of the particular evidence regarding the two officers for the purpose described above.

IV. CONCLUSION

Clustka's surviving children have presented sufficient evidence to survive summary judgment on the large majority of the claims brought under § 1983. On the basis of the evidence presented by the Conns, the jury could reasonably find that Clustka demonstrated a serious medical need when she attempted to choke herself with a seatbelt in the paddy wagon and threatened to kill herself; that Ashton and Robertson were deliberately indifferent to that medical need; and that their indifference was a factual and proximate cause of Clustka's death. On the basis of the Conns' evidence, a jury could also reasonably determine that the City of Reno's failure to train its law enforcement officials and implement written policies on suicide prevention constituted deliberate indifference and were, independently, a moving force behind Ashton and Robertson's violation of Clustka's constitutional rights.

We therefore reverse the district court's grant of the defendants' motion for summary judgment with respect to individual and municipal liability, with the exception that we affirm the grant of summary judgment with respect to the City's failure to address Robertson's deficient performance and its failure to discipline the individual officers. The case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLA CONN, et al.,) 3:05-cv-00595-HDM-RAM
Plaintiffs,) ORDER
vs.) (Filed Mar. 8, 2007)
CITY OF RENO, et al.,)
Defendants.)

Before the court is the defendants' motion for summary judgment (#49). Plaintiffs have opposed (#53), and defendants have replied (#58).

Plaintiffs Charla and Dustin Conn bring this action against the City of Reno and its officers Ryan Ashton and David Robertson pursuant to 42 U.S.C. § 1983 for the alleged violation of the constitutional rights of their mother, Brenda Clustka.[1] Plaintiffs' claims stem from Clustka's April 28, 2005, suicide while a pretrial detainee in Washoe County Jail ("WCJ") and are based on the individual defendants' interaction with Clustka on April 26, 2005.

On March 19, 2005, Reno Police Department ("RPD") officers, among them defendant Ashton, arrested Clustka for misdemeanor domestic battery after a dispute she had with her mother at their shared residence. Clustka was booked into WCJ. The next day she was placed on suicide watch for about 4 hours after making comments about "not being able to make it in jail." (Pl. Mot.,[2] Exs. 4-6; Def. Mot. at 3). Clustka remained at WCJ for more than a month, during which time her mother applied for and received a temporary protective order ("TPO") that required Clustka to stay away from her house and be accompanied by RPD when retrieving her belongings. (Def. Mot. at 3). Clustka was released from WCJ on April 22. (*Id.*)

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[1] Charla Conn appears both individually and on behalf of Clustka's estate.

On April 25, Clustka and her mother had a verbal altercation when she told her mother she would overdose on her anxiety medication. Her mother called 911 at 8 a.m. and reported that Clustka had threatened to kill herself. (Def. Mot. at 3). RPD officers responded and took Clustka to Washoe Medical Center ("WMC") to be evaluated for an involuntary commitment to a mental health facility. She was admitted to the emergency department of the hospital at about 9:30 a.m. She was examined by WMC staff, and she denied to the staff that she had ever made any suicide threats or attempts. Clustka was then transferred to Northern Nevada Mental Health

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[2] Pl. Mot. refers to plaintiff's motion for partial summary judgment, submitted on November 3, 2005, which is not before the court.

Institute ("NNMHI") on a Legal 2000 commitment.[3] (*Id.* Ex. B). She arrived at NNMHI at around 4:30 p.m. NNMHI staff held her overnight and released her around 9:30 a.m. on April 26 after determining she was a "low risk of harm." (*Id.* Ex. C). Upon her release, Clustka was given back the anxiety medication on which she had threatened to overdose the day before. (*Id.*)

At around 2 p.m. that same day, Regional Emergency Medical Services Authority ("REMSA") responded to a 911 call from a motorist reporting that a woman (Clustka) was passed out on a sidewalk. Finding Clustka intoxicated, REMSA called RFD to take her into Civil Protective Custody[4] ("CPC"). (Def. Mot. at 4; Pl. Opp'n Ex. 6). Defendants Ashton and Robertson responded. (Pl. Opp'n Ex. 6). They found Clustka intoxicated, and described her as having red, watery eyes, slurred speech, and difficulty walking. (Pl. Opp'n Ex. 8 (Ashton Dep. at 10:21-11:2; 22:5-8)). A preliminary breath test registered her blood alcohol level at .10%. (*Id.* Ex. 6). When the officers told

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[3] Legal 2000 is an emergency admission procedure whereby mentally ill people deemed to be a danger to themselves or others may be involuntarily committed to a mental health facility for up to 72 hours. *See* Nev. Rev. Stat. §§ 433A.115, 433A.150 *et seq.*

[4] Under Nev. Rev. Stat. § 458.270, a person found in a public place intoxicated and unable to care for herself must be taken to either an alcohol abuse facility or a city or county jail for shelter and supervision until she is no longer under the influence of alcohol.

Clustka they were taking her in for a CPC, she became belligerent, refused to get in the police vehicle, and, apparently aware of the outstanding TPO, demanded that she be taken to her mother's house to retrieve her belongings. (*Id.* Ex. 8 (Ashton Dep. at 21:19-22:11); *id.* Ex. 9 (Robertson Dep. at 38:17-19; 38:20-23)). Although the officers intended to take Clustka to WCJ, Robertson, in an attempt to diffuse the situation, told her they would take her home. (*Id.* Ex. 9 (Robertson Dep. at 39:4-17)). Clustka then calmed down; the officers helped her into the vehicle and fastened her seat belt, but they did not handcuff her. (*Id.* Ex. 5 (Ashton Int. at 4:12-13)). As they were preparing to leave for WCJ, the wants and warrants report received by Ashton revealed that Clustka had a history of violence, substance abuse, and mental illness. It also reflected the outstanding TPO, but the officers declined to serve it on Clustka because of her level of intoxication. (*Id.* Ex. 6 at 2).

On the way to WCJ, Clustka unfastened her seat belt and began walking around the vehicle and knocking on the surveillance camera. (Pl. Opp'n Ex. 5 (Ashton Int. at 4:15-19)). Ashton asked whether they should stop to put the seat belt back on, but Robertson said they were almost to the jail. (*Id.* Ex. 6 at 2). When they stopped at the railroad crossing near the jail, Clustka, who had been looking out the window, sat down and lapped a seat belt around her neck. Ashton believed Clustka engaged in this conduct once she realized she was going to jail and not to her mother's house. (*Id.* Ex. 5 (Ashton Int. at

5:14-17); Pl. Opp'n at 8:11-14). Ashton observed Clustka's action through the surveillance camera and told Robertson it appeared she was trying to "choke herself." The officers got out of the vehicle and went to the back, where they removed the seat belt from Clustka's neck, placed flexible handcuffs on her, and refastened her seat belt. (Pl. Opp'n Ex. 5 (Ashton Int. at 5:18-6:9); *id.* Ex. 6 at 2-3). As they were doing so, Clustka screamed, "You lied to me. Just kill me. I'll just kill myself then." (*Id.* Ex. 5 (Ashton Int. at 6:5-6); *see also id.* Ex. 9 (Robertson Dep. at 45:11-21) (describing Clustka's words as "You lied to me, I want to die, kill me, you lied to me.")).

After Clustka was secured, they continued on to WCJ, arriving around 3 p.m. When the defendants opened the back of the police vehicle, Clustka screamed again that she "wanted to die." (*Id.* (Robertson Dep. at 46:25-47:4). Unidentified WCJ deputies other than the defendants removed Clustka from the vehicle, and while she was in the intake area, Clustka screamed that the officers had beat her. (*Id.* Ex. 5 (Ashton Int. at 6:15-16)). The officers told WCJ deputies that Clustka was disoriented. They did not advise anyone of the incident in the back of the police vehicle, nor did they report it to their supervisor or write an incident report that day. (*Id.* Ex. 5 (Ashton Int. at 7:10-8:8); *id.* Ex. 9 (Robertson Dep. at 46:11-24-48:4)). At WCJ, a Prison Health Services ("PHS") nurse gave Clustka a standard CPC evaluation, which meant checking Clustka's vital signs and general appearance. (*See id.* Ex. 7

(Singletary Dep. at 44:2-12)). The nurse did not note that Clustka appeared to be a suicide risk. (Def. Reply Ex. F). Clustka was held in CPC until about 8:30 p.m., at which time she was released from the jail. Before she left the facility, she was served with the TPO. (Def. Mot. at 7).

Despite the TPO, Clustka returned to her mother's house. At 11:30 p.m., her mother called 911 to report that Clustka was causing a disturbance. The RPD officers, not the defendants, who responded noted that Clustka appeared grossly intoxicated, so they took her back to WCJ for another CPC. As her blood alcohol was below .08%, she was refused for CPC, but the officers then took her to WMC, where she was readmitted for observation. (Def. Mot. at 7). WMC released Clustka around 3 a.m. on April 27 without sending her on to NNMHI for a Legal 2000. The medical staff's observations noted that Clustka was alert and oriented, and that she was being discharged because she didn't want any treatment. (Def. Reply at 5; *id.* Ex. G).

At 2:30 p.m. on the same day, Clustka showed up grossly intoxicated at her mother's house in violation of the TPO. After her mother called 911, Clustka was arrested by officers of the RPD, not the defendants, and taken to WCJ. There, a nurse examined Clustka, and although she denied being suicidal, Clustka did admit she was taking anxiety medication. The nurse put her in a red jumpsuit to indicate a high-risk inmate and placed her in the mental health unit of the jail. (Def. Mot. at 8; Def. Reply Ex. H).

At 8 a.m. on April 28, Clustka was taken out of her cell for a video arraignment on the TPO violation. As Clustka returned to her cell at around 8:35 a.m. following the arraignment, she appeared distraught and was crying. (Pl. Mot. Exs. 13-15). At about 9:17 a.m., WCJ officials found her hanging from her bed sheet, unresponsive. (*Id.* Ex. 14). Deputies cut her down from the sheet and administered life-saving measures without success. (*Id.* Ex. 15). She was pronounced dead at 9:55 a.m. (*Id.*)

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Lynn v. Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free . . . to grant summary judgment."). Conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

A. Liability of Individual Defendants

To prove a violation under § 1983, a plaintiff must establish that the defendants (1) acting under color of law (2) deprived plaintiff of the rights, privileges, or immunities secured by the Constitution or the laws of the United States. *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986). There is no dispute here that defendants were acting under the color of law.

Plaintiffs allege that defendants Ashton and Robertson were deliberately indifferent to Clustka's serious medical need – specifically, a particular vulnerability to suicide. *See Payne v. Churchich*, 161 F.3d 1030, 1041 (7th Cir. 1998); *Est. of Abdollahi v. County of Sacramento*, 405 F. Supp. 2d 1194, 1203-04 (E.D. Cal. 2005). Plaintiffs maintain that Ashton and Robertson had a constitutional obligation to protect Clustka once they realized she was vulnerable, either by telling WCJ officials that Clustka had wrapped the seat belt around her neck while in the police vehicle or by taking her to the hospital for care on April 26.

Under the 8th Amendment, prison officials must take reasonable measures to guarantee inmate safety, which includes addressing serious physical and mental health needs. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982). Because Clustka was a pre-trial detainee, plaintiffs' claims arise under the 14th Amendment Due Process Clause. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). However, because the rights under both the 8th and the 14th Amendments are comparable, the Ninth Circuit applies the same standards to both claims. *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

To state a claim under the 8th and 14th Amendments, plaintiffs must show (1) an objectively, sufficiently serious deprivation; (2) that the individual defendants were "deliberately indifferent" to Clustka's health and safety – that is, they must have had a "sufficiently culpable state of mind," *see Farmer*, 511 U.S. at 834; *Est. of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002); and (3) harm caused by the indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

Plaintiffs argue that Clustka objectively required protection because she was in fact at risk of suicide; for years, she had struggled with depression and suicidal tendencies. (Pl. Opp'n Exs. 1-3). The issue before the court is whether Clustka posed an objective risk of suicide.

Defendants argue that when they interacted with Clustka on April 26, she was not objectively suicidal. In the days before her suicide, Clustka was examined or evaluated by a number of different medical and law enforcement personnel, and all of them either did not determine she was a suicide risk or ultimately released her after finding she was no longer at risk. First, Clustka was admitted to NNMHI on April 25, 2005, and on admission was found to be a high risk of harm. Upon release, however, she was rated a low risk of harm, and the medications she had threatened to overdose on were returned to her. Second, on April 26 the intake nurse who examined Clustka for the CPC initiated by Ashton and Robertson made no determination that Clustka was a suicide risk. Further, Clustka did not attempt to harm herself and made no suicide threats during this custody. Third, WMC emergency staff who evaluated Clustka in the early morning hours of April 27, after she was released from CPC, did not note that she was a suicide risk, and they did not send her to NNMHI for a Legal 2000. Finally, the intake nurses at WCJ did not find that Clustka was a suicide risk and did not place her on a Legal 2000 when she was arrested for violating the TPO on April 27.

None of the medical personnel who examined or treated Clustka at the time of her release from NNMHI on April 26, during her two visits to WCJ on April 26, on her admission to WMC early April 27, and then at WCJ on April 27 concluded that Clustka posed a risk of suicide. While this evidence, that on the relevant dates the health officials concluded that Clustka was not suicidal, suggests that Clustka's medical needs on April 28 were not objectively serious enough to find a 14th Amendment violation, the court does not need to decide the issue because the evidence is insufficient to establish as a matter of law that the defendants were deliberately indifferent to Clustka's serious medical needs when they failed to report the seat belt incident or that such failure to report caused harm to Clustka.

A prison official is deliberately indifferent to a person's serious medical needs where he or she "knows of and disregards an excessive risk to inmate safety." *Farmer*, 511 U.S. at 837. The defendants must both (1) be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and (2) they must also draw the inference. *Id.*; *Toguchi v. Chung*, 391 F.3d 1051, 1057

(9th Cir. 2004). The plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

It is no violation if the person should have been aware of the risk, but was not. *Toguchi*, 391 F.3d at 1057; *Jeffers v. Gomez*, 267 F.3d 895, 914 (9th Cir. 2001). Because the defendant's state of mind is a question of fact, it can be demonstrated "in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. Knowledge may be inferred if a risk was obvious. *Farmer*, 511 U.S. at 842; *McCoy v. Terhune*, 2006 WL 2374753 at *3 (E.D. Cal. 2006); *see also Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1197 (9th Cir. 2002) (noting that a plaintiff could show that officers "must have known" of a risk of harm by showing the obvious and extreme nature of a detainee's abnormal behavior). An obvious risk is one that a reasonable person would realize. *Farmer*, 511 U.S. at 842. However, "obviousness per se will not impart knowledge as a matter of law." *McCoy*, 2006 WL 2374753 at *3.

Defendants were aware of the following facts relevant to this inquiry. First, Ashton knew that Clustka had a history of violence, substance abuse, and mental problems – both from the wants and warrants report and from his personal interaction with her a month before. Second, both defendants noted that Clustka was disoriented and intoxicated.

Finally, defendants observed Clustka wrap the seat belt around her neck and heard her state, "You lied to me. Just kill me. I'll just kill myself then," or words to that effect.

Although the defendants' state of mind is a question of fact, the plaintiffs must present sufficient evidence to allow a trier of fact to conclude that officers Ashton and Robertson believed that Clustka was suicidal.[5] Both officers testified that they believed that Clustka was not trying to hurt herself in the police vehicle when they transported her April 26. They reached this conclusion because: (1) based on Clustka's behavior, they believed that her actions with the seat belt arose from anger and intoxication, and that she was attempting to manipulate them and get their attention; (2) they believed she could not have actually hurt herself because the seat belt would have slackened once she tried, and she knew the officers were watching her through the surveillance camera; and (3) when they went to the back of the police vehicle, Clustka had enough breath to scream at them, and there were no visible bruises or marks on her neck where the seat belt had been held.[6]

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[5] Plaintiffs allege that the risk was obvious to the defendants because they saw Clustka wrap the seat belt around her neck and heard her scream that she wanted to die. But these facts alone do not constitute an obvious risk, as reasonable people could come to differing conclusions as to what Clustka intended by that conduct.

While the evidence suggests that the defendants' failure to report the seat belt incident was a violation of department policy, such a violation of policy in this case does not create a constitutional violation. *See Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 929-30 (9th Cir. 2001) (citing cases from several circuits finding that violations of internal policies do not necessarily give rise to § 1983 liability). While the actions of Officers Ashton and Robertson in failing to report the seat belt incident may have been negligent conduct, such conduct does not create a triable issue of fact sufficient to support a finding of deliberate indifference.

Defendants also persuasively argue that there is no causal connection between their actions on April 26 and Clustka's injury – her suicide two days later. Plaintiffs contend that had defendants told WCJ staff about the seat belt incident, written a report, or taken Clustka to the hospital for treatment, "a whole safety net of precautions" would have prevented her suicide.

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[6] Robertson, in fact, says he would handle the situation exactly the same if it were to happen again. (Pl. Opp'n Ex. 9 (Robertson Dep. at 130:6-8; 133:20-25)). Ashton says that he still does not feel that a Legal 2000 was appropriate for Clustka; however, if the same situation were to recur today he would report it to his supervisor, but only because he now knows that his supervisor wants such incidents reported, not because he believes that Clustka was trying to hurt herself. (*Id.* Ex. 8 (Ashton Dep. 33:2-35:7; 83:20-85:9)).

"When plaintiffs . . . seek to hold an individual defendant personally liable for damages, the causation inquiry. . . . must focus on whether the individual defendant was in a position to take steps to avert [the injury] but failed to do so intentionally or with deliberate indifference." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Even assuming that plaintiffs could show deliberate indifference, they still must prove that the indifference was the "actual and proximate cause" of the deprivation of Clustka's rights. *See id.* at 634. It is sufficient for causation if the defendants set in motion a series of acts by others that they knew or reasonably should have known would cause others to inflict the constitutional injury. *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 966 (9th Cir. 2004).

Clustka's claim is premised on the fact that defendants deprived her of "avenues of protection" to prevent her suicide. As Clustka was released from the custody imposed by the defendants after less than six hours without any medical incidents and was free to seek (and indeed did receive) medical attention on her own, the claim is most properly cast as delayed medical treatment.

When the 8th Amendment deprivation is a failure to treat a serious medical need, deliberate indifference requires showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need; and (b) harm caused by the indifference. *See Jett*, 439 F.3d at 1096. Although the Ninth Circuit does not require a *de minimis* physical injury to sustain an 8th Amendment claim, *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002), a delay in medical treatment is a sustainable claim only if a resulting harm is shown. *See Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994).

The harm presented by the facts of this case is Clustka's suicide. The failure to provide Clustka medical attention for about six hours while she was in CPC resulted in no harm; Clustka did not injure or attempt to injure herself while in CPC, nor did she try to harm herself upon release. Moreover, after her release but before her subsequent arrest she was evaluated on two separate occasions – once by a CPC intake nurse and the other by WMC professionals.

The amount of intervening medical attention that Clustka received is substantial in this case. Clustka was evaluated by a number of different medical professionals after her release from the CPC that was initiated by the defendants: (1) she was seen by the CPC intake nurse who refused her because her blood alcohol level was too low; (2) she was seen by WMC emergency department staff, who released her almost immediately; and (3) she was seen by the last CPC nurse upon her arrest on April 27. These intervening events, along with Clustka's independent decision to return to her mother's house and violate the TPO, defeat any claim that there was a causal link between the defendants' failure to report the seat belt incident and Clustka's suicide.

Further, the plaintiffs have failed to present admissible evidence that had the defendants advised the intake personnel of the seat belt incident the course of events would have been any different. Plaintiffs' argument in this regard relies entirely on speculation. Plaintiffs suggest that defendants had three options, all of which would have averted Clustka's suicide. First, the defendants could have taken Clustka to the hospital, where she would have been carefully watched, thoroughly assessed, and transferred to a mental health institute where she would have been kept as long as needed. Second, the defendants could have told jail authorities, and the authorities could have refused Clustka for CPC and sent her to the hospital for detoxification and suicide assessment, thereafter to be transferred to a mental institute. Finally, the defendants could have told jail authorities, and the authorities could have kept her, observed her for any suicidal actions, and then put her on a Legal 2000 when they released her from CPC.

The evidence does not support these conclusions. PHS Nurse Gail Singletary testified that suicide threats and attempts are just one factor used in determining how to handle a patient. (Pl. Opp'n Ex. 7 (Singletary Dep. at 41:11-16; 49:8-16)). Had the jail staff been told of Clustka's actions, they could have refused her for admittance. Equally as likely, they could have kept her and watched her for suicidal acts, and then released her after detoxification without instituting a Legal 2000. Had Clustka been taken to the hospital, she would have been evaluated, but it is as likely as not that the hospital staff would have released her, or if she had been sent to the mental health facility, she could have been released just as she was on April 26. (Pl. Opp'n Ex. 14 (Gansert Dep. At 10:1-6)).

In addition, if defendants had told jail staff of Clustka's actions with the seat belt in the police vehicle, and jail staff decided to watch Clustka for suicidal tendencies and then release her (as they actually did) after she was detoxified, the course of events would not have been any different. In such a case, even though Clustka would have been in the jail the day before threatening suicide, this information would not have been available to the PHS nurses who did her intake April 27 after she was arrested. This is because the paper trail on CPCs is minimal, and incoming inmates, as Clustka was the night of April 27, are not screened for any past CPCs. (*See* Pl. Opp'n Ex. 7 (Singletary Dep. at 54:7-55:16)). Thus, even if the officers had reported the incident and it had been noted in the CPC file, no one would have known about it when Clustka was checked in April 27, unless the same intake nurse handled her both times. (*Id.*) The parties do not dispute that the nurses who handled Clustka on April 26 and April 27 were different.

Plaintiffs have failed to establish sufficient facts to support a conclusion by the trier of fact that the conduct of the defendants in failing to report the seat belt incident constituted deliberate indifference to Clustka's rights, or that the conduct of the defendants was the actual cause of Clustka's harm sufficient to constitute a 14th Amendment violation and impose § 1983 liability.

B. Municipal Liability

Plaintiffs also allege a § 1983 violation by the City of Reno. They do so on four bases: (1) failure to train, (2) failure to implement policies, (3) failure to discipline, and (4) charging a known deficient officer with the responsibility of protecting the public. They allege that because the City of Reno had no written policy on the reporting of suicide threats, no suicide prevention policy, and no training on how to distinguish genuine suicide threats, that Ashton and Robertson did not properly handle Clustka on April 26.

A municipality may be held liable only where it inflicts an injury; it may not be held liable under a respondeat superior theory. *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978); *Gibson v. County of Washoe*, 290 F.3d at 1185. Liability may be established by what the municipality does or by what it fails to do; that is, there may be direct liability or liability by omission. *Gibson v. County of Washoe*, 290 F.3d at 1186; *see also Est. of Abdollahi*, 405 F. Supp. 2d at 1204.

Direct liability may be established by showing either that the city violated Clustka's rights or that it directed an employee to do so. *Gibson v. County of Washoe*, 290 F.3d at 1185. The city is liable for injuries inflicted pursuant to its own policies, regulations, customs, or usage. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994). Plaintiffs do not allege any direct violation of Clustka's constitutional rights by the city. Rather, their argument focuses on what the city failed to do.

A city may be liable where its omission amounts to deliberate indifference to the rights of persons with whom the police come into contact, and the deficiencies are closely related to the plaintiff's ultimate injury. *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989). To establish liability by omission, plaintiffs must show that a (1) city employee violated Clustka's rights; (2) the city has customs or policies that amount to deliberate indifference; and (3) these policies were the "moving force" behind the employee's violation of Clustka's constitutional rights. *Gibson v. County of Washoe*, 290 F.3d at 1193-94.

For the reasons set forth above, plaintiffs have failed to establish that Clustka's constitutional rights were violated by the individual defendants. Therefore, under the facts of this case the plaintiffs cannot establish a § 1983 claim against the City of Reno.

Accordingly, defendant's motion for summary judgment is **GRANTED**. The clerk of the court is directed to enter judgment in favor of the defendants and against the plaintiffs.

IT IS SO ORDERED.

DATED: This 8th day of March, 2007.

/s/ Howard D. McKibben
UNITED STATES
DISTRICT JUDGE

⑥

AUG 9 - 2010

No. 09-1361

In the Supreme Court of the United States

CITY OF RENO, RYAN ASHTON, AND DAVID ROBERTSON,
Petitioners,

v.

CHARLA CONN AND DUSTIN CONN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323
keysercooper@yahoo.com

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

QUESTIONS PRESENTED

It is settled that the States have a duty not to deny prisoners necessary care in the face of serious medical needs. *Estelle* v. *Gamble*, 429 U.S. 97, 102-03 (1976). A state official who has actual knowledge that a detainee is at imminent risk of serious harm and *does nothing* thus violates the detainee's constitutional rights. *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994). The lower courts have uniformly held that an imminent risk of suicide constitutes a serious medical need sufficient to trigger a duty to respond by, for example, reporting the risk so that detainee may be placed on suicide watch. See, *e.g.*, *Cavalieri* v. *Shepard*, 321 F.3d 616, 622 (7th Cir. 2003); *Turney* v. *Waterbury*, 375 F.3d 756, 761 (8th Cir. 2004); *Snow* v. *City of Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005).

The questions presented are:

(1) Whether a custodial officer has actual knowledge that a detainee is at imminent risk of suicide – sufficient to trigger a duty to respond – when the officer witnesses the detainee both threaten and attempt suicide in the officer's presence.

(2) Whether, when an officer has violated a detainee's constitutional rights by failing to respond reasonably to a known suicide risk, a municipality may be held liable if the constitutional violation resulted from a municipal policy or failure to train.

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STATEMENT

Mischaracterizing the holding below, petitioners present questions that holding does not raise. They repeatedly assert that the court of appeals required law-enforcement officers to "diagnose and report detainees' symptoms of suicidal tendencies" and insist that, as a result, municipalities in the Ninth Circuit must now train officers to act as psychiatrists able to "diagnose and report" such symptoms. Pet. i. On at least 35 occasions, petitioners erroneously suggest that the court of appeals imposed a duty to "diagnose."

But this case is not about diagnosis; it is about whether custodial officers who personally witness a detainee threaten and attempt suicide in their presence have a duty to respond reasonably.

Here, while transporting Brenda Clustka to the local jail, the petitioner police officers saw Clustka attempt suicide by choking herself with a seatbelt in the back of the police wagon, and heard Clustka scream that she wanted to kill herself. The court below found, based on the cumulative evidence, that a jury *could* conclude, first, that the officers were subjectively aware of a serious and imminent risk Clustka would commit suicide and, second, that they acted with deliberate indifference by failing to inform subsequent custodians what they saw and heard.

This holding is neither novel nor incorrect. Indeed, *every* circuit to consider this issue has reached the same result. In every prison suicide case, the operative question is whether there is evidence in the record from which a jury could conclude the custodian had *actual knowledge* that the detainee was an imminent suicide risk by virtue of, for example, witnessing recent suicide attempts or threats. If an officer has actual knowledge but fails to respond reasonably, a claim may lie. No court disagrees with the Ninth Circuit's view.

Not only is review therefore unnecessary on its face but, in the court below, petitioners waived the very arguments they now present There, petitioners argued only, *as a matter of fact*, that they lacked actual knowledge of Clustka's serious medical need. They conceded that, if they *had* such knowledge, they failed to respond reasonably. Petitioners now sing a different tune: Their petition turns on the newly minted argument that they lack any duty to report suicide attempts because police officers have no obligation to "diagnose" suicidal tendencies. This novel argument, raised here for the first time, has been waived.

Nor is review warranted of the lower court's holding that respondents presented sufficient evidence to create triable questions of fact regarding municipal liability. The court properly applied settled law to the particular factual circumstances before it, and there is no reason to believe that other circuits would have held otherwise. The petition accordingly should be denied.

A. Factual Background

1. On March 19, 2005, Clustka was arrested for domestic battery of her mother. Pet. App. 18. Clustka's behavior and words suggested she was suicidal; prison officials accordingly placed her on suicide watch. Clustka was released on April 21, 2005. *Id.* at 18-19.

A few days later, on April 25, 2005, Clustka again became suicidal and was taken (at family members' direction) to Washoe Medical Center, then transferred to Nevada Mental Health Institute where she was involuntarily committed. Clustka was medically evaluated and discharged the next morning. Pet. App. 19.

A few hours later, in the early afternoon of April 26, 2005, petitioners Ashton and Robertson responded to a 911 call that Clustka was passed out on a sidewalk. Pet. App. 19. When the officers arrived, Clustka was intoxicated but not stumbling, falling down, or causing a disturbance. Appellants' Excerpts of Records ("ER") 218. Ashton – who participated in Clustka's March 19 arrest – recognized her and knew of her mental health problems. A warrants check indicated Clustka was known to have "violent tendencies, [that she was] known to abuse drugs, [was an] alcoholic [and had] other mental health problems." Pet. App. 19-20 (internal quotation marks omitted). Petitioners decided to take her into civil protective custody. *Ibid.*

When petitioners told Clustka they were taking her to jail, she became agitated and uncooperative. To induce Clustka to enter the paddy wagon, Robertson told her, falsely, they were taking her home. Pet. App. 20. Petitioners did not handcuff Clustka. *Ibid.* En route to the jail, Ashton saw, via the vehicle's video monitor, that Clustka had unlatched her seatbelt and was moving about. *Id.* at 20-21. He asked Robertson if they should stop to secure Clustka, but Robertson declined. ER 151.

When Clustka saw they were approaching the jail and not her home, she became extremely agitated. Ashton watched Clustka wrap a seatbelt around her throat. He told Robertson she was "trying to choke herself." ER 149; Pet. App. 20-21. The officers stopped the vehicle. It took both officers to "remove [Clustka's] clenched fists from the seatbelt" and unwind it from around her neck. ER 159, 195.

Clustka screamed repeatedly, "Kill me or I'll kill myself." ER 150, 195; Pet. App. 21. When they arrived at the jail sally port, Clustka screamed again she "wanted to die." ER 215. The evidence indicates both officers believed she was not "joking" (ER 235, 350; Pet. App. 21), acknowledging she was "emotionally distraught" (ER 195) and "might be seriously mentally ill" (ER 235).

Ashton, who had been a police officer for only seven months, asked Robertson – an eighteen-year veteran – if they should report Clustka's suicide attempt and suicide threats. Robertson answered, "No." The officers rationalized that the threat had not been serious because Clustka could not have killed herself, as the seatbelt would have lost tension after she passed out. ER 151.

As the court below noted, however, the evidence suggests a different explanation for petitioners' failure to report Clustka's suicide attempt and threats: "Both officers believed that failing to handcuff Clustka while transporting her, and failing to fasten her into her seat belt once she unbuckled it, were violations of policy. Had they reported the incident, they would have had to report their own misconduct." Pet. App. 33; see also *id.* at 33 n.4.

Petitioners did not alert subsequent custodians to Clustka's suicide attempt and threats. Pet. App. 21. Four hours after being held at the Washoe County Jail, Clustka was released without further inquiry. *Id.* at 22. That evening, she was again taken to the emergency room, observed for gross intoxication only, and subsequently released. *Ibid.*

The next day, on April 27, 2005, Clustka violated a restraining order by returning to the home she had shared with her mother, was arrested, and was again taken to the jail. Pet. App. 22. The nurse who screened Clustka upon her admission was unaware of Clustka's suicide attempt and suicidal statements the day before. Instead of assigning Clustka to suicide watch status, she recommended Clustka be assigned to the general inmate population. *Ibid.* Had Clustka been placed on suicide watch, the prison would not have provided a bed sheet in her cell. *Id.* at 22-23.

The morning of April 28, 2005, Clustka, visibly upset, returned to her cell following her arraignment. Pet. App. 23. After Clustka did not respond to roll call, a deputy discovered she had committed suicide by hanging herself with her bed sheet. *Ibid.*

Later that day, petitioner Ashton explained to a jail deputy that he and Robertson knew Clustka had "tried to hang herself" two days earlier (ER 74; Pet. App. 23) but that his more senior partner declined to document the "suicide attempt." Ashton stated he would now write a report and his "sergeant will be pissed." *Ibid.*

2. While tragic, what happened to Clustka is no isolated incident. Suicide has long been known to be the leading cause of death in United States jails. Goss *et al.*, *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, JAIL SUICIDE/MENTAL HEALTH UPDATE, Vol. 11, No. 3 (Fall 2002) (ER 385). Because a mentally ill person is likely to feel extreme

trauma at the point of initial incarceration, the likelihood of suicide is known to be highest in the first fourteen days of confinement. *Jutzi-Johnson* v. *United States*, 263 F.3d 753, 757 (7th Cir. 2001) (citing Lindsay M. Hayes *et al.*, *National Study of Jail Suicides: Seven Years Later* (National Center on Institutions and Alternatives) (1988)). The majority of suicide victims communicate suicidal intent before killing themselves. ER 165. The risk "is concentrated in the early days and even hours of being placed in jail, before the inmate has had a chance to adjust to his dismal new conditions." *Boncher ex rel. Boncher* v. *Brown County*, 272 F.3d 484, 486 (7th Cir. 2001).

Washoe County Jail had witnessed frequent detainee suicides. Between January 2004 and August 2005, six detainees committed suicide while incarcerated there. Pet. App. 23-24. Clustka's suicide followed another detainee's by fewer than 30 days. *Ibid.* Despite these recurrent suicides, the record indicates the City did not provide its officers with any training on how to respond to suicide attempts or threats. ER 274. Petitioners here testified they never received such training. ER 186, 194, 228.

Less than a month after Clustka's suicide, the Reno Police Department presented a training class on how to respond to mentally ill detainees. A new suicide prevention policy was soon implemented, directing transport officers to communicate any suicidal gestures or threats they witness to jail staff. ER 166-67. This policy requires an arresting officer to answer questions about a detainee's mental health at intake, including questions that focus on suicide risk. Pet. App. 24.

B. Procedural Posture

1. Respondents, Clustka's surviving children, filed this suit under 42 U.S.C. § 1983, alleging in relevant part that Ashton and Robertson violated Clustka's Fourteenth Amendment rights "by making [the] deliberate and intentional decision to not notify Washoe County Detention facility staff of Clustka's suicide attempt and to not write an incident report documenting the attempt." ER 10. Respondents also asserted a claim against the City of Reno, alleging in relevant part that the City's "failure to properly train, supervise, control and/or discipline defendants Ashton and Robertson with respect to their obligations to report suicide attempts by detainees is the cause in fact and proximate cause of the injuries claimed." ER 11.

During discovery, respondents obtained extensive evidence concerning the individual petitioners' subjective awareness of the serious medical risk to Clustka. For example, when Ashton spoke with a jail deputy following Clustka's suicide, Ashton characterized the incident he witnessed as a "suicide attempt," adding "she tried to hang herself in the wagon." ER 74. Ashton further explained he told Robertson that Clustka "was trying to choke herself." ER 149. Responding to requests for admissions, both officers admitted Clustka "became emotional[ly] distraught," "attempted to choke herself," and "threatened to kill herself." ER 349, 359. Robertson testified that reporting the incident would have taken "five seconds." ER 215.

Additionally, respondents obtained substantial evidence concerning the serious medical risk Clustka faced. Jail health director Gail Singletary testified the officers should have let jail nurses know what they saw and heard because there would have been "opportunity to do a more complete evaluation." ER 174. Washoe Medical Center emergency physician Guy Gansert likewise testified that police typically transport a person who threatens suicide to the emergency department where suicide threats are taken "very seriously." ER 323, 325. Finally, psychiatrist Jeffrey Caplan, who previously treated Clustka for suicidal ideation, testified it would have been "critical to get Brenda Clustka to mental health care had she made a repeat suicide threat and attempt on April 26th." ER 337.

2. Upon conclusion of discovery, petitioners moved for, and the district court granted, summary judgment. See Pet. App. 64-74. In the district court's view, although "the actions of Officers Ashton and Robertson in failing to report the seat belt incident may have been negligent conduct, such conduct does not create a triable issue of fact sufficient to support a finding of deliberate indifference." *Id.* at 67.

The court thus concluded that respondents "failed to establish sufficient facts to support a conclusion by the trier of fact that the conduct of the defendants in failing to report the seat belt incident constituted deliberate indifference to Clustka's rights, or that the conduct of the defendants was the actual cause of Clustka's harm." Pet. App. 71-72. Based on this conclusion, the court held that no claim against the municipality could lie. *Id.* at 73.

3. The Ninth Circuit reversed, finding that respondents presented sufficient evidence to raise jury questions on both individual and municipal liability.

a. Addressing the claims against the individual officers, the court explained that the deliberate indifference claim has three elements: (1) objective, serious medical need; (2) deliberate indifference to that need; and (3) harm caused by the officers' indifference. Pet. App. 27. The court concluded there was sufficient evidence in the record to create triable issues of fact on each of these prongs.

First, the court found that "[a] heightened suicide risk or an attempted suicide is a serious medical need." Pet. App. 27. After reviewing the evidence, the court determined that "[a]n objective juror could certainly conclude that in light of all the circumstances Clustka's actions evidenced a serious medical need." *Id.* at 30. Petitioners' arguments to the contrary, the court concluded, "merely create a fact question for the jury to resolve." *Ibid.* Petitioners do not challenge this conclusion.

Second, turning to deliberate indifference, the court explained that this element itself has two requirements: (a) the officer was subjectively aware of the serious medical need, and (b) the officer nonetheless failed to respond reasonably. Pet. App. 30.

Addressing subjective awareness, the court found a triable issue on whether the officers were in fact subjectively aware of Clustka's suicide risk: "Clustka attempted to choke herself with a seat belt and screamed something to the effect of 'kill me or I'll kill myself'; these are warning signs that are difficult for any observer to miss." Pet. App. 32. This conclusion was bolstered by the circumstantial evidence explaining why the officers remained silent: They feared they had violated department policy. *Id.* at 33. Finally, the court reasoned, the officers' after-the-fact statements provided additional support for a factual finding that they were indeed subjectively aware of Clustka's serious medical need. *Id.* at 33-34.

"[C]umulatively," the court concluded, this "evidence is sufficient to create a material issue of fact on the question of the subjective awareness of both officers. * * * We must leave the question of subjective awareness to the jury." *Id.* at 35 (internal quotation marks omitted).

Turning to the reasonableness of the officers' response, the court specifically observed that petitioners did not challenge the legal rule that they now contest here. They *never* argued that they lacked a duty to respond reasonably to Clustka's serious medical need – they assumed they had such a duty. They argued only that the *facts* were insufficient to establish actual knowledge: "The defendants do not argue that, if we find that the officers *were* subjectively aware of Clustka's serious medical need, they nonetheless responded appropriately." Pet. App. 35.

Third, while acknowledging that the "question of causation is closer," the court was "satisfied * * * that the [respondents] presented sufficient evidence of actual and proximate causation to defeat summary judgment and give rise to a jury question whether the officers' omissions caused Clustka's eventual suicide." Pet. App. 35-36. In the court's view, "[a] jury could reasonably find that the defendants' failure to report critical information rendered the subsequent medical evaluations ineffectual." *Id.* at 40. That said, the court also noted that, "[w]hen presented to the jury," petitioners' arguments that their conduct did not cause Clustka's suicide "may well succeed." *Id.* at 39. Again, petitioners do not challenge this holding.

Finally, the court rejected petitioners' argument for qualified immunity: "When a detainee attempts or threatens suicide en route to jail, it is obvious that the transporting officers must report the incident to those who will next be responsible for her custody and safety. Thus, the constitutional right at issue here has been clearly established." Pet. App. 45.

b. Addressing municipal liability, the court found that respondents presented triable questions of fact here, too. Respondents offered evidence that the City "fail[ed] to train its officers in suicide prevention and the identification of suicide risks" (Pet. App. 47); that this "failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue" (*id.* at 48); and that, had petitioners "been trained in suicide prevention, there is a reasonable probability that they would have responded differently and reported to the jail that Clustka was at risk of suicide, or taken her directly to the hospital" (*ibid.*). The court thus concluded that respondents "presented sufficient evidence to establish a genuine issue of fact with respect to municipal liability for failure to train." *Ibid.*

Likewise, the court determined that a jury could find the City liable due to its failure to adopt a suicide prevention policy. Pet. App. 49-51. The court rejected two other municipal liability theories asserted by respondents. *Id.* at 51-52.

4. The court voted to deny rehearing en banc. Chief Judge Kozinski, joined by six others, dissented. See Pet. App. 3-16.

REASONS FOR DENYING THE PETITION

Further review of this case is not warranted for several reasons. *First*, petitioners have waived the central argument they present here. The individual officers argued below, not (as a matter of *law*) that they lacked a duty to report assuming they had actual knowledge of an imminent risk of suicidal harm, but only (as a matter of *fact*) that they *lacked actual knowledge*. Perhaps recognizing the factbound nature of the arguments pressed below, petitioners assert for the first time that, even if they *did* have actual knowledge, they lacked a duty to report. That argument, having been waived, provides no basis for granting the petition.

Second, even if the issue had been properly preserved it would not warrant this Court's attention. There should be no dispute that, if an officer has *actual* knowledge of a detainee's risk of suicide, the officer must respond reasonably. A reasonable response includes reporting this information to subsequent custodians. No circuit has held otherwise.

Third, municipal liability turns, in the first instance, on whether a constitutional violation occurred.[1] Where an official has violated an individual's constitutional rights by failing to respond reasonably to a known risk of suicide, inquiry may then turn to whether a municipal policy or failure to train caused the constitutional deprivation. That is what the Ninth Circuit did here. There is no reason to think any other circuit would reach a different conclusion.

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[1] In addressing municipal liability first, petitioners place the municipal cart before the constitutional horse. This Court has long held that a successful claim for municipal liability is predicated upon an independent, underlying constitutional violation. See *City of Los Angeles* v. *Heller*, 475 U.S. 796, 799 (1986). Accordingly, the analysis must begin with the question whether the individual officers violated Clustka's constitutional rights.

I. PETITIONERS WAIVED THE QUESTIONS PRESENTED.

To begin with, petitioners never argued before the court below that, as a legal matter, they *lacked a duty to report* suicide risks. Instead, they argued only that, as a matter of fact, they lacked subjective knowledge sufficient to *trigger* that duty. Petitioners have therefore waived review of the questions presented in the petition.

A Fourteenth Amendment claim for failure to provide a pre-trial detainee adequate medical treatment turns on the long-established deliberate indifference standard. The Ninth Circuit's application of that standard to the unique facts of this case involved no innovation. On the contrary, the court merely concluded that summary judgment was not appropriate because respondents adduced evidence from which a jury *could* conclude:

(1) that Clustka had a "serious medical need" that, if not treated, "could result in further significant injury" (Pet. App. 27);

(2) that the officers were "deliberately indifferent" to that serious medical need, which requires proof the officers were subjectively aware of the serious risk to Clustka's safety and failed adequately to respond to this risk (*id.* at 30); and

(3) that the officers' deliberate indifference actually and proximately caused Clustka's injury (*id.* at 35-36).

Petitioners do not challenge this framework. Nor do petitioners contest the lower court's decision concern ing the first and third elements of the deliberate indifference inquiry.

Rather, petitioners' argument – addressing both individual and municipal liability – turns exclusively on their contention that they were not deliberately indifferent. As the court below explained, "deliberate indifference" has two distinct parts: "that the officers were (a) *subjectively aware* of the serious medical need and (b) failed to adequately respond." Pet. App. 30 (citing *Farmer*, 511 U.S. at 828).

Before the court below, petitioners argued only that Clustka's evidence was insufficient to prove the first prong of the deliberate indifference analysis. They contended respondents could not establish deliberate indifference because, *as a matter of fact*, they lacked subjective awareness of the medical risk Clustka faced. They did *not* argue the second prong – that, as a matter of law, they lacked a duty to "report," "share," or "communicate" information suggesting a serious risk of suicide (assuming they had actual knowledge of that risk). See Appellees' Answering Br. at 30-38. Petitioners' briefing below focused *solely* on the sufficiency of respondents' factual showing. See, *e.g. id.* at 31 ("[Respondents] were required to present sufficient evidence that would allow a trier of fact to conclude the officers knew Clustka was suicidal."); *id.* at 32 ("[Respondents] produced no evidence that either officer actually knew Clustka was at substantial risk of serious harm."); *id.* at 33 ("The facts referenced by [respondents] do not provide evidence of actual knowledge."), *id.* at 35 (Respondents did not "establish[] sufficient evidence to demonstrate a genuine issue of fact regarding either officers' state of mind"); *id.* at 38 ("[Respondents] failed to show there was sufficient evidence to raise a genuine issue of material fact regarding the officers' knowledge of a substantial risk of serious harm to Clustka.").

That is how the Ninth Circuit saw it, too: "The defendants do not argue that, if we find that the officers *were* subjectively aware of Clustka's serious medical need, they nonetheless responded appropriately." Pet. App. 35 (emphasis in original). Thus, the question presented to the lower court was purely factual – whether respondents offered sufficient evidence for a jury to conclude that the individual petitioners were subjectively aware of Clustka's serious medical need. Petitioners never argued that, if they had such actual knowledge, they were not required to report this information to subsequent custodians.[3]

Perhaps cognizant that such a purely fact-bound question would not warrant this Court's attention, petitioners have now taken an about-face, arguing that, even if they *were* subjectively aware of Clustka's serious medical need, they nonetheless acted reasonably because they had no duty to report the information. See, *e.g.*, Pet. i (presenting question whether "law-enforcement officers [must] diagnose and report detainees' symptoms of suicidal tendencies"); *id.* at 3 ("whether law-enforcement officers must diagnose and communicate detainees' symptoms of suicidal tendencies"); *id.* at 16 (whether "the Due Process Clause requires law-enforcement officers to diagnose and report symptoms of mental illness"); *id.* at 29 (whether "failure to diagnose and share medical information could amount to deliberate indifference"). This is precisely the argument the lower court noted was waived below.

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[3] Presaging the waiver problem, petitioners hint that the dissent from denial of rehearing en banc demonstrates that the legal issues raised for the first time in the petition were, in fact, presented below. Pet 40. But that is not so. In fact, the petition for rehearing beat precisely the same drum as the merits briefing, arguing exclusively that the officers lacked subjective knowledge of Clustka's medical need. See Pet for Reh'g En Banc, at 11 ("No reasonable jury could find that the officers were aware of an excessive risk that Clustka would commit suicide by not reporting her intoxicated conduct without having information about her history regarding suicidal threats.").

The rule on waiver is well-settled: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (internal quotation marks omitted). Such a glaring defect is, of itself, sufficient reason to deny review here.

II. THE INDIVIDUAL LIABILITY HOLDING DOES NOT WARRANT REVIEW.

It is hardly surprising that petitioners waived this argument below. This Court has long held that the state is obligated to provide prisoners necessary care in the face of a serious medical need. *Estelle* v. *Gamble*, 429 U.S. 97, 102-03 (1976). Likewise, the Court has explained that an official who subjectively knows a detainee is at imminent risk of serious harm but does nothing violates the detainee's constitutional rights. *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994)

The Ninth Circuit's ruling merely applied the tried-and-true deliberate indifference standard to the facts of a case where officers both watched the detainee attempt and heard her threaten suicide. The court correctly held that, when a custodial officer has actual knowledge that a detainee is an imminent suicide risk, the officer has a duty to respond reasonably. Remaining silent and failing to communicate this information to anyone – including subsequent custodial officers – is not a reasonable response. No court of appeals has reached a contrary conclusion.

A. There Is No Circuit Conflict Concerning Individual Liability.

All circuits to consider deliberate indifference in the jail suicide context agree on the controlling standard: If a law-enforcement officer possesses *actual knowledge* that a detainee in his or her custody has recently attempted to commit suicide or expressly threatened to do so, the officer must take reasonable precautions. While, unsurprisingly, courts sometimes find liability and sometimes not, these different outcomes turn on application of this same legal standard to differing factual situations.

1. Petitioners are incorrect to assert that the holdings of two circuits are in conflict on this point with the ruling below. Pet. 30.[3] In *Elliott* v. *Cheshire County*, 940 F.2d 7 (1st Cir. 1991), the First Circuit concluded "there can be no deliberate indifference if the defendants are unaware that the detainee poses a risk of harm to himself." *Id.* at 11. Thus, where "there was no evidence that the corrections personnel had actual notice of [the detainee's] need for protection from himself," no claim could lie. *Ibid.*

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[3] Each of the decisions purportedly in conflict with the holding below predates this Court's 1994 decision in *Farmer*, which announced the now-prevailing deliberate indifference standard. If the decisions cited by petitioners were in tension with the holding below – and as demonstrated in text, they are not – there would be reason to doubt they survive *Farmer*.

Petitioners concede the facts of *Elliott* "are not identical" to the circumstances here. Pet. 31. There, an eighteen-year-old boy committed suicide after spending some days in detention. The court found the officer who arrested and transported the boy – Trooper Ranhoff – not liable because it was "undisputed that [he] did not know of [the detainee's] previous suicide attempts." *Elliott*, 940 F.2d at 12. Because Ranhoff had no knowledge of any recent suicide attempts or threats, he breached no duty.

The court, however, *reversed* the district court's grant of summary judgment favoring various corrections personnel. Two inmates alleged they heard the boy threaten suicide while in custody and "reported the suicide threat to corrections officers." *Elliott*, 940 F.2d at 11. The court concluded – in accord with the decision below – that, if the corrections officers had actual knowledge of the boy's suicide threat yet failed to respond reasonably, they could be found liable. *Id.* at 11-12.

In *Manarite* v. *City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992), the First Circuit confirmed this view of the proper legal standard, explaining that "when liability for serious harm or death, including suicide, is at issue, a plaintiff must demonstrate 'deliberate indifference' by showing, (1) an unusually serious risk of harm (self-inflicted harm, in a suicide case), (2) defendant's *actual knowledge* of (or, at least, willful blindness to) that elevated risk, and (3) defendant's failure to take obvious steps to address that known, serious risk" (emphasis added). The Ninth Circuit here applied the same standard.

Nor does the Third Circuit apply a contrary rule. In *Freedman* v. *City of Allentown*, 853 F.2d 1111, 1115 (3d Cir. 1988) – decided over 20 years ago – the court held that a claim lies "[w]hen facts have been pled which * * * demonstrate that the prison officials *actually knew* of the suicidal tendencies of a particular prisoner, and ignored their responsibility to take reasonable precautions" (emphasis added). There, a young man, Freedman, committed suicide after being detained. *Id.* at 1113. Among the defendants were officer Balliet, who detained Freedman, and probation officer Kroboth, who knew Freedman had previously exhibited suicidal tendencies. *Ibid.*

The court affirmed dismissal of the complaint against Balliet because the plaintiffs did "not allege" he possessed "actual knowledge * * * of Freedman's suicidal tendencies." *Freedman*, 853 F.3d at 1115. At most, plaintiffs' evidence showed "mere negligence * * * in failing to recognize Freedman's suicidal tendencies from the scars that were readily apparent." *Id.* at 1116. The court emphasized that, if Balliet *did* have actual knowledge, he could have been found liable.

The court also affirmed dismissal of the claim against Kroboth. *Freedman*, 853 F.3d at 1117. Kroboth allegedly knew Freedman had attempted suicide in the past. *Ibid.* Kroboth, however, had neither custodial responsibility for Freedman nor knowledge of *recent* suicide attempts or threats suggesting an *imminent* suicide risk.

Williams v. *Borough of West Chester*, 891 F.2d 458 (3d Cir. 1990), decided a year later, is no different. In *Williams*, the court again considered whether custodial officers had actual knowledge of a detainee's recent suicide attempts or threats. In that case, Williams committed suicide while in police custody. Years before his suicide, he had made other suicide attempts and threats. *Id.* at 462-63. Because there was "no direct evidence" the custodial officers "actually knew" of those prior incidents, the court found the officers could not have been deliberately indifferent. *Id.* at 465. But the court emphasized that, if those officers *did* have actual knowledge, they could have been found liable. *Id.* at 461. The court also dismissed a claim against a police dispatcher, McBride, who knew the detainee had in the past "threatened to jump from a bridge." *Id.* at 463. As a civilian dispatcher, McBride "had no custodial responsibility for prisoners." *Id.* at 462 & 466-67. Moreover, the bridge incident occurred seventeen months earlier, giving no basis to believe Williams was in *imminent* danger. *Id.* at 463. There is simply no basis to conclude that the Third Circuit's decisions in those decades-old, pre-*Farmer* cases conflict with the holding here.

2. A recent decision of the Ninth Circuit – issued after the petition in this case was filed – forecloses any suggestion that the Ninth Circuit applies a legal rule at odds with other courts of appeals.

Simmons v. *Navajo County*, __ F.3d __, 2010 WL 2509181 (9th Cir. June 23, 2010), involved a seventeen-year-old boy who, after one week in custody, told an officer "he had tried to kill himself by cutting his left wrist with a razor." *Id.* at *1. The boy was placed on suicide watch and evaluated frequently throughout the next month. *Id.* at *1-2. Over a month later, the boy committed suicide. *Id.* at *2. The district court granted jail personnel summary judgment, and – relying heavily on its decision in this case – the Ninth Circuit affirmed. *Ibid.*

Writing for a unanimous panel, Judge O'Scannlain found that jail nurse Jones, who treated the boy for his initial suicide attempt, could not be liable because "over a month had elapsed since his suicide attempt with the razor, during which time [the boy] received counseling, took antidepressants, and by all accounts, was doing better." *Simmons*, 2010 WL 2509181, at *4. No evidence supported the inference that Jones knew the boy "'was at *acute* risk of harm' at the time he killed himself." *Ibid.* (quoting *Conn* v. *City of Reno*, 591 F.3d 1081, 1097 (9th Cir. 2010)) For a similar reason, the court found a second nurse not liable. *Id.* at *6.

The Ninth Circuit also found not liable the officer on duty when the boy committed suicide, noting, "[i]t is uncontested that [the officer] did not know about [the boy's] previous suicide attempt." *Simmons*, 2010 WL 2509181, at *6. That the boy was on Level II suicide watch did not give the officer knowledge of his immediate danger because that designation "is designed for emotionally unstable, rather than imminently suicidal, detainees." *Ibid.* Invoking language from this case, the court explained: "While [the boy's] suicide watch status may have alerted [the officer] to the possibility of suicide, we cannot say that the magnitude of the risk was 'so obvious that [he] *must* have been subjectively aware of it.'" *Id.* at *7 (quoting *Conn*, 591 F.3d at 1097).

Simmons demonstrates the baselessness of petitioners' fanciful warning that the holding below "obligates officers to make nuanced psychiatric diagnoses." Pet. 3. Nothing about the lower court's decision requires a law-enforcement officer to play psychiatrist. Rather, the opinion simply obligates a custodial officer to report obvious suicide attempts and threats to subsequent custodians. That holding is wholly unexceptional.

B. The Ninth Circuit's Decision Concerning Individual Liability Is Correct.

The decision below is not only consistent with those by other courts of appeals, it is also correct. Law-enforcement officers have a duty to report suicide attempts or threats they personally witness and, because this duty is clearly established, there can be no qualified immunity here.

1. Arguing that "law-enforcement officers' mere failure to communicate falls well short of deliberate indifference" (Pet. 33), petitioners rely heavily on *Davidson* v. *Cannon*, 474 U.S. 344 (1986).[4] That reliance is misplaced. Davidson (an inmate) wrote a note relating a threatening comment by a fellow prisoner and, subsequently, the prisoner attacked Davidson. Finding Cannon (a prison official who read the note) not liable for Davidson's injury, this Court focused on whether Cannon had actual knowledge of an *imminent* threat and concluded he did not: "Cannon mistakenly believed that the situation was not particularly serious." *Id.* at 348. Davidson himself "testified that he did not foresee an attack, and that he wrote the note to exonerate himself in the event [the other prisoner] started another fight." *Id.* at 346. Davidson also conceded that Cannon was at most negligent. *Id.* at 347.

Thus, consistent with the decisions described above, *Davidson* stands for the principle that an official's duty turns on whether, as a subjective matter, he or she has actual knowledge of a detainee's serious risk of harm. In *Davidson*, where the official had no subjective knowledge of that risk, no duty attached. But *Davidson* assuredly does not stand for the very different rule that, if an official has *actual knowledge* a detainee is at imminent risk of harm, the official is free to do nothing.

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[4] Petitioners never cited *Davidson* below, further demonstrating they have waived this argument.

Any confusion over the correct rule to apply in these deliberate indifference cases was settled eight years later in *Farmer* v. *Brennan*, 511 U.S. 825 (1994). There, the Court explained that, to be held deliberately indifferent, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. Actual knowledge may be demonstrated by circumstantial evidence that the risk was obvious:

> Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from the circumstantial evidence, * * * and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.

Id. at 842 (internal quotation marks omitted). Once an official has this requisite awareness, he has a duty to respond reasonably under the circumstances. *Id.* at 837-38, 844-45.

The court below correctly applied this controlling law in deciding respondents presented sufficient evidence to create triable factual questions on deliberate indifference. It evaluated the entire record and concluded that, because the officers witnessed Clustka both attempt and threaten suicide, a reasonable jury could conclude the individual officers had subjective awareness of her serious medical need. Pet. App. 31-35. Pointedly, the officers' after-the-fact admissions present strong additional evidence supporting respondents' claim.

Once an official has subjective knowledge of a serious medical risk, he or she must "respond[] reasonably to the risk." *Farmer*, 511 U.S. at 844. If an official "act[s] reasonably," no liability may lie. *Id.* at 845. As the court below concluded, if the individual officers had subjective knowledge of Clustka's serious medical need, they obviously breached their duty to respond reasonably because they did nothing whatsoever. See Pet. App. 35. It was for good reason that petitioners did not argue below that they "responded adequately to the situation presented." *Ibid.*

Petitioners' argument that "their single instance of not passing along Clustka's threats to prison guards may perhaps have been negligent" but "[fell] far short of deliberate indifference" (Pet. 34-35) is entirely untethered from the well-established deliberate indifference standard. If the officers had *actual knowledge* of Clustka's serious medical need yet failed reasonably to respond, the jury could find them deliberately indifferent.

2. Because these legal standards have been clearly established for decades, petitioners' invocation of qualified immunity is unpersuasive. In fact, numerous decisions have held that officers have a duty to report information relating to suicide attempts or threats. See, *e.g.*, *Cavalieri* v. *Shepard*, 321 F.3d 616, 622 (7th Cir. 2003); *Turney* v. *Waterbury*, 375 F.3d 756, 761 (8th Cir. 2004); *Snow* v. *City of Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005).

III. THE MUNICIPAL LIABILITY HOLDING DOES NOT WARRANT REVIEW.

A. There Is No Conflict Concerning Municipal Liability.

Petitioners get no further with their claim of a conflict in the circuits on the scope of municipal liability. Pet. 17-23. In making this argument, petitioners point to decisions holding only that there can be no municipal liability absent an underlying constitutional violation by individual officers. But those decisions do *not* stand for the much broader proposition that municipalities *never* may be held liable "for failing to train law-enforcement officers" on how to respond to threats of suicide. *Id.* at 18. In fact, petitioners do not identify a single case in which a court held that a jury could *not* find municipal liability for failure to train where the plaintiff was able to establish a constitutional deprivation by municipal officials.[5]

1. In *Burns* v. *City of Galveston*, 905 F.2d 100 (5th Cir. 1990) (cited at Pet. 19, 23), the Fifth Circuit readily acknowledged that "municipal liability *may* be premised on a policy or custom that fairly may be said to have been the cause of or a significant contri-

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[5] Petitioners' municipal liability argument focuses solely on the Ninth Circuit's holding on the failure-to-train claim. Pet. 17-28. But the court below also held municipal liability could stem from the city's failure to adopt a suicide prevention policy. Pet. App. 49-51. Petitioners entirely ignore this alternative theory of liability. Thus, even if petitioners were correct in their contention that "*Harris* does not open municipalities to liability for failure to train officers to diagnose detainees' suicidal tendencies" (Pet. 24), the "failure to adopt and implement policies" claim would remain on remand. Review is inappropriate on this basis alone

buting factor to a suicide." *Burns*, 905 F.2d at 103 (emphasis added). According to that court, a municipality *does* have an obligation "to train its police officers to recognize and not ignore obvious medical needs of detainees with known, demonstrable, and serious mental disorders." *Id.* at 104. The court concluded, however, that the defendant municipality could not be held liable in that case, *not* because municipalities may *never* be liable for failure to train officers to recognize signs of imminent suicide, but because there was no underlying constitutional violation that could give rise to municipal liability in the first place. As the court explained, the evidence before it did not establish that particular officials had actual, subjective knowledge of the decedent's suicidal intentions. Although the decedent's cellmate testified that the decedent had threatened to kill himself, the officers did not hear the threat. *Id.* at 101-02. The decedent's mother also gave the officers "no reason to believe [the decedent] had any mental problems or suicidal tendencies." *Id.* at 102.

Subsequent Fifth Circuit law agrees. Sitting en banc, that court held in *Hare* v. *City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996), that municipal liability *could* lie in an inmate suicide case if it were shown that a municipal policy or custom caused an underlying constitutional violation. And quite recently, the Fifth Circuit affirmed that municipalities do indeed have an obligation to train custodial officers to respond to suicide risks of which they have *actual* knowledge:

> In the specific context of prison suicide prevention, municipalities must provide custodial officials with minimal training to detect *obvious* medical needs of detainees with

> *known, demonstrable,* and serious medical disorders, but a failure to train custodial officials in screening procedures to detect *latent* suicidal tendencies does not rise to the level of a constitutional violation.

Whitt v. *Stephens County*, 529 F.3d 278, 284 (5th Cir. 2008) (internal quotation marks omitted). That is precisely the holding here.

2. Similarly, in *Popham* v. *City of Talladega*, 908 F.2d 1561 (11th Cir. 1990) (cited at Pet. 19), the Eleventh Circuit found no underlying constitutional violation to justify potential municipal liability. The court held "the facts in [that] case [did] not rise to a level sufficient to support the constitutional standard of deliberate indifference" by the individual officers. *Id.* at 1564. Specifically, those officers "did not *know* [the decedent had] threatened suicide from his jail cell." *Ibid.* (emphasis added). Only a neighboring inmate had overheard the decedent's suicide threat, and "[h]e made no attempt to notify authorities." *Ibid.*

Thus, consistent with the Fifth Circuit, the Eleventh Circuit in *Popham* rejected the plaintiff's failure-to-train claim, not because such claims are categorically unsustainable – to the contrary, the court recognized that "inadequate police training may provide a basis for section 1983 liability * * * where failure to train amounts to deliberate indifference" (908 F.2d at 1564–65) – but because the officers lacked the crucial "knowledge of a detainee's suicidal tendencies." *Id.* at 1564.

3. The Sixth Circuit's decision in *Barber* v. *City of Salem*, 953 F.2d 232 (6th Cir. 1992) (cited at Pet. 20, 23), is no different. In *Barber*, the court

"adopt[ed] the Eleventh Circuit's holding in *Popham*" and further explained that, under *Popham*, a municipality *may* be held liable for failure to train when "the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to deliberate indifference." *Id.* at 239–40. There again, the court rejected municipal liability for purely factual reasons: the decedent's actions in that case "could not be considered abnormal and would not alert the jail authorities to a strong likelihood that [he] would commit suicide." *Id.* at 240. The court correctly noted that, "where no constitutional violation exists for failure to take special precautions, none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides." *Ibid.*

More recently, the Sixth Circuit confirmed that municipalities *may* be held liable for detainee suicides where the facts suggest an underlying constitutional violation caused by a municipality's failure to take adequate precautions. In *Cooper ex rel. Estate of Morton* v. *County of Washtenaw*, 222 Fed. App'x 459, 469, 473 (6th Cir. 2007), the court found that an officer's conduct "arguably constitute[d] [a] constitutional violation" because he "was on notice" that a detainee was a suicide risk. The court reversed dismissal favoring the municipality and remanded for a factual determination whether the officer's "deficient behavior can be fairly characterized as a 'city policy.'" *Id.* at 473. The Sixth Circuit is thus firmly in accord with the holding of the court below.

4. The First Circuit follows exactly the same approach. In *Manarite*, 957 F.2d at 959 (cited at Pet. 21, 23), that court held, not that municipalities may

never be held liable for failure to train officers to respond to acute suicide risks, but that there was no evidence the particular officers "ha[d] been willfully blind not to have noticed[] that the decedent posed a strong risk of suicide," as "the decedent exhibited no manifestations of suicidal tendencies." Moreover, entirely unlike the facts here, the municipality in *Manarite* had "implemented guidelines and procedures to prevent persons held in protective custody from inflicting harm on themselves." *Ibid.* On the presumption that municipalities *could* be held liable under appropriate circumstances but that the city *had* appropriately trained its officers, the court saw "no basis here for finding that the decedent's suicide is closely related to the failure of the [city] to train its officers in suicide prevention." *Ibid.* Nothing in *Manarite* is inconsistent with the result in this case.

Citing both *Manarite* and the decision below, a district court in the First Circuit recently denied a municipality's motion to dismiss a detainee suicide claim. *Coscia ex rel. Estate of Coscia* v. *Town of Pembroke*, __ F. Supp. 2d __, 2010 WL 2223685 (June 4, 2010). That court expressly distinguished *Manarite* on the factual basis that there was "no information about what the municipality taught officers regarding potentially suicidal detainees and whether that teaching comported with applicable state laws." *Id.* at *12.

5. So too, the Seventh Circuit's decision in *Boncher ex rel. Boncher* v. *Brown County*, 272 F.3d 484 (7th Cir. 2001) (cited at Pet. 20), has adopted the same approach to municipal liability. Although the detainee in that case had made a generalized suicide threat, he did so in a joking manner and, when questioned about it, expressly denied being a suicide risk.

On those facts, the court concluded there was not "any doubt that the intake officers believed that he was joking * * * and that he was not a serious suicide risk." *Id.* at 487. The court distinguished other Seventh Circuit precedent on that ground, concluding: "The defendants simply were not alerted to the likelihood that Boncher was a genuine suicide risk." *Id.* at 488. In analyzing the facts before it, the court in *Boncher* acknowledged that municipalities that fail to take appropriate "precautions against the possibility of inmate suicide * * * would be guilty of deliberate indifference in the relevant sense" if, for example, officers were confronted with "evidence of profound mental disturbance" and a statement from the decedent that he "was suicidal" and yet did nothing. *Id.* at 486–87.

Subsequent Seventh Circuit authority demonstrates how municipal liability turns on the specific factual circumstances. In *Woodward* v. *Correctional Medical Services of Illinois, Inc.*, 368 F.3d 917, 927 (7th Cir. 2004), the court affirmed a judgment against a private contractor that provided medical and health services to a prison. Applying the standard municipal-liability framework, the court concluded, based on the evidence before it, that the contractor's "actual policy and practice caused its employees to be deliberately indifferent to [the decedent's] serious" risk of suicidal harm. *Id.* at 928. Given an underlying constitutional violation, the critical question for the court was whether "the violation was a 'highly predictable consequence' of the municipality's failure to act." *Id.* at 929 (quoting *Bd. of County Comm'rs* v. *Brown*, 520 U.S. 397, 409 (1997)).

That is precisely the question the court below posed before finding a triable issue on municipal liability. Pet. App. 47-48. *Woodward* thus demonstrates the principle applied by every circuit: When an individual state official is found to have violated a detainee's constitutional rights by failing to respond to an acute risk of suicidal harm, the municipality *may* be held liable for failure to train.

6. The consistency of the decision below with *Burns*, *Popham*, *Barber*, *Manarite*, and *Boncher* was recently confirmed by the Ninth Circuit's decision in *Simmons*. Relying on the decision below for the governing legal standards, Judge O'Scannlain's decision for the court distinguished the facts in this case from those then before it: In this case "official[s] knew a pretrial detainee was actively suicidal but failed to ensure that precautionary measures were undertaken," but in *Simmons* "the evidence [did not] support[] the inference that Nurse Jones knew [the decedent] 'was at acute risk of harm' at the time he killed himself." 2010 WL 2509181, at *4–*5 (quoting, *Conn*, 591 F.3d at 1097). The court focused on whether the jailors in *Simmons* had subjective knowledge of an acute risk of suicide. Because there was no evidence to establish an "underlying constitutional violation," the plaintiff there "[could] not maintain a claim for municipal liability." *Id.* at *7. The law of the Ninth Circuit is in complete accord with that of all other courts of appeals.[6]

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[6] Petitioners' reliance for their claim of a conflict (Pet 22-23) on the Third Circuit's judgment in *Simmons* v. *City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991), is inapposite. In that fractured decision, there was a judgment against only the municipality, which the court reviewed under a "highly deferential standard" subject to the municipality's waiver of the "know-

B. The Ninth Circuit's Decision Concerning Municipal Liability Is Correct.

The decision below in this case is a straightforward and correct application of settled law to unique facts. In *City of Canton* v. *Harris*, 489 U.S. 378, 390 (1989), this Court held municipal liability appropriate when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."

Here, the court below properly applied this standard in holding that unresolved factual questions exist that will determine whether municipal liability is appropriate. In addition to the sharply disputed factual question whether the individual petitioners committed a constitutional violation in the first place, the court found that municipal liability under a failure-to-train theory also turns on several additional questions of fact: (1) whether "the City did, in fact, fail to train its officers in suicide prevention and the identification of suicide risks" (Pet. App. 47); (2) whether "[t]he failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue" (*id.* at 48); and (3) whether, "had the City trained its officers, the violations of Clustka's constitutional rights could have been avoided" (*ibid.*). In addressing these ques-

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ledge" requirement. *Id.* at 1072 n.30. Writing for himself, Judge Becker appeared to suggest that a municipality could be liable even absent a constitutional violation by an individual officer. *Id.* at 1049-50. But that was not the holding of the court in this case.

tions, the court properly concluded that respondents "presented sufficient evidence to establish a genuine issue of fact" and that "a reasonable jury *could* find" the City liable. *Ibid.* (emphasis added).

Petitioners nevertheless assert that taking action in response to a "detainees' suicidal tendencies" is not "within the scope of police officers' duties." Pet. 24. But that blunderbuss contention misstates well-established law. This Court has long held that "deliberate indifference to serious medical needs of prisoners" is a constitutional violation. *Estelle*, 429 U.S. at 104. There is no doubt that an imminent risk a prisoner will commit suicide constitutes such a "serious medical need." Thus, if an official has actual knowledge that a detainee is at imminent risk of suicide, the official must respond reasonably. As the courts of appeals have uniformly held, this is one of the "tasks * * * officers must perform." See *Harris*, 489 U.S. at 390.

On this point, it bears emphasis that petitioners, their *amicus*, and Chief Judge Kozinski in his dissent from denial of rehearing all vastly overstate the scope and practical implications of the holding below. It is plain on the face of the Ninth Circuit's decision that it does *not* impose "costly psychiatric-training duties" on municipalities, "obligate[] officers to make nuanced psychiatric diagnoses," (Pet. 3, 37-39), or "transform * * * police officers into suicide prevention experts." Pet. App. 5. And it certainly does not direct judges to "micromanage the police" or oblige municipalities "to run [their] suicide prevention program[s] in whatever manner unelected federal judges think best" (*id.* at 8) – much less "create[] novel duties to train and report information that bear no relationship to the fact of incarceration." *Id.* at 4.

Instead, so far as municipal liability is concerned, *all* the court below held is that a jury might find deliberate indifference when a municipality did *nothing* to train officers or adopt suicide prevention policies, in circumstances where the local jail had been the scene of repeated recent suicides. Pet. App. 47-48, 50. There is no hint in the court's holding of any requirement that municipalities train police officers in psychiatry or to be suicide prevention "experts." The only question in this case, after all, is whether officers should be educated to report to subsequent custodians when they see a person in their custody threaten, and actually attempt, suicide. The Ninth Circuit said nothing about what such training or policies might encompass. And the court of appeals' answer to the question here is unexceptional: Reporting known facts indicating serious, imminent risk to persons in custody has long been among the *most basic* of police duties. Given the pre-trial posture of this case and the incomplete record, nothing here warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458 3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES*
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

* *Admitted in New York only; admission to the District of Columbia pending.*

Counsel for Respondents

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In the Supreme Court of the United States

CITY OF RENO, RYAN ASHTON, AND DAVID ROBERTSON,
Petitioners,

v.

CHARLA CONN AND DUSTIN CONN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323
keysercooper@yahoo.com

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to Rule 15.8 of the Rules of this Court, respondents submit this brief to address the impact on this case of the Court's recent decision in *Connick* v. *Thompson*, No. 09-571 (Mar. 29, 2010).

Brenda Clustka committed suicide while in the custody of the City of Reno. Respondents, Clustka's survivors, sued petitioners, two police officers who, despite hearing Clustka threaten to commit suicide and witnessing her attempt to do so, failed to report this information to subsequent custodians. They also sued the City of Reno, contending that it was deliberately indifferent for failing to train its officers to respond to suicide risks posed by persons in their custody. Reversing the district court's grant of summary judgment to the petitioners, the court below concluded that respondents presented triable questions of fact with respect to whether the individual officers were deliberately indifferent. Additionally, the court concluded that respondents presented sufficient evidence to raise triable questions as to whether the City's failure to train its police officers established municipal deliberate indifference. Br. in Opp. 3-11.

This Court's decision in *Connick* is wholly consistent with the decision below. Certiorari in this case therefore should be denied.

a. In *Connick*, the Court indicated that "a municipality's failure to train its employees in a relevant respect" may be challenged under 42 U.S.C. § 1983 when it "amount[s] to deliberate indifference to the rights of persons with whom the untrained employees come into contact." Slip op. at 9 (quotation omitted). Although "a stringent standard," "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Ibid.* (quotation omitted). Accordingly, a "pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 9-10 (quotation omitted).

The claimant in *Connick*, however, attempted to rely on a "single-incident" theory, suggesting that a "showing of 'obviousness' can substitute for the pattern of violations ordinarily necessary to establish municipal culpability." Slip op. at 11. Although the Court noted that "unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under [Section] 1983 without proof of a pre-existing pattern of violations," the Court held that a failure to train government attorneys to avoid violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), is not such a circumstance. Slip op. at 11-12.

b. *Connick* is consistent with the holding below because the municipal liability claim here *is* based on a "pattern of similar constitutional violations," and is not the sort of "single-incident" theory considered by *Connick*.

First, the court of appeals in this case concluded that evidence in the record demonstrates that "the City did, in fact, fail to train its officers in suicide prevention and the identification of suicide risks." Pet. App. 47. Indeed, "[t]he City of Reno has not provided any evidence to the contrary." *Ibid.*

Second, the court identified specific evidence demonstrating that there was a substantial pattern of past constitutional violations. Evidence in the record demonstrates that five *other* suicides occurred at the Washoe County Jail within a two-year period. Pet. App. 47. And one of the individual petitioners testified that he had "encountered between 500 and 1,000 people threatening to kill themselves" in his career. *Id.* at 47-48. Thus, the City's failure to train had the "highly predictable consequence" of permitting inmate suicide. Pet. App. 48.

Third, the court of appeals found that, given the evidence in the record, a jury could conclude that the if the City had properly trained its officers, the individual defendants would not have been deliberately indifferent to Cluska's medical needs. Pet. App. 48. That is, had the individual defendants "been trained in suicide prevention, there is a reasonable probability that they would have responded differently and reported to the jail that Clustka was at risk of suicide, or taken her directly to the hospital." *Ibid.*

The court's decision below was thus premised on evidence in the record that could lead a jury to conclude that (a) the City knew that prisoners were at risk of committing suicide in the Washoe County Jail, (b) had the City adopted a training program for its police officers, it would have prevented these suicide deaths, and (c) in failing to implement such a training program, the City was deliberately indifferent.[1] This is precisely the sort of liability theory the

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[1] The Ninth Circuit's analysis with respect respondents' argument that the City was deliberately indifferent for failing to adopt and implement policies to prevent inmate suicide was identical: "As the Conns have presented sufficient evidence of a

Court in *Connick* found *could* support a claim for municipal deliberate indifference. A jury must now decide these disputed questions of fact in this case based on the substantial evidence in the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TERRI KEYSER-COOPER
Counsel of Record
Law Office of Terri Keyser-Cooper
3365 Southampton Drive
Reno, NV 89509
(775) 337-0323

DIANE K. VAILLANCOURT
Law Office of Diane K. Vaillancourt
849 Almar Ave., Ste. C403
Santa Cruz, CA 95060
(831) 458-3440

CHARLES A. ROTHFELD
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondents

MARCH 2010

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failure to adopt and implement suicide-prevention policies so as to give rise to a jury question, the rest of our analysis mirrors that which we described above regarding the failure to train." Pet. App. 50.

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Supreme Court, U.S.
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No. 09-1361

IN THE

Supreme Court of the United States

CITY OF RENO, RYAN ASHTON,
AND DAVID ROBERTSON,
Petitioners,
v.
CHARLA AND DUSTIN CONN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

Stephanos Bibas
Nancy Bregstein Gordon
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

John J. Kadlic
Counsel of Record
Donald L. Christensen
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioners submit this brief to address the impact on this case of the Court's recent decision in *Connick* v. *Thompson*, No. 09-571 (Mar. 29, 2011).

Following standard procedure, six sets of medical professionals performed medical, mental-health, and suicide-prevention evaluations of arrestee Brenda Clustka in the days before her suicide at the Washoe County jail. (Respondents incorrectly state that she "committed suicide while in the custody of the City of Reno." Supp. Br. Resps. 1.) Respondents sued not the county or jail personnel, but the City of Reno and its two arresting police officers. They alleged that the city was deliberately indifferent for not training officers on the street to diagnose and report detainees' symptoms of suicidal tendencies and that the officers were individually liable for not diagnosing and reporting those symptoms. The district court granted summary judgment for petitioners. The Ninth Circuit reversed, in an opinion by Judge Reinhardt, and denied rehearing en banc over a dissent by Chief Judge Kozinski joined by six other judges. Pet. 3-15.

Like *Connick*, this is a single-incident failure-to-train case. This Court's decision in *Connick*, like the dissent below, underscores that single-incident liability should remain narrow and truly exceptional, a principle ignored by the Ninth Circuit's decision below. Although *Connick*'s reasoning applies here, this case arises in a distinct factual context involving police rather than lawyers. *Connick* informs but did not resolve the circuit splits on both questions presented, which remain substantial, important, and recurring. Thus, this Court should grant certiorari.

1. In *Connick*, this Court stressed that "[a] pattern of constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." Slip op. at 9-10 (internal quotation marks omitted). Single-incident liability is reserved for "the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious" as to give notice even without "proof of a pre-existing pattern of violations." *Id.* at 11. A "stringent standard of fault," including a pattern requirement, is essential to keep municipal liability from "collaps[ing] into *respondeat superior*." *Id.* at 18. Reading 42 U.S.C. § 1983 more expansively would give "courts *carte blanche* to micromanage local governments throughout the United States." *Id.* at 16.

The respondent in *Connick* noted that during the decade before his armed robbery trial, four convictions had been reversed because prosecutors in petitioner Connick's office had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963). Slip. op at 10. This Court nevertheless refused to treat those four reversals over the course of ten years as a pattern putting petitioners on notice of a need for training. *Id.* Moreover, respondent had not pleaded and proven a pattern of violations but rather had pursued a single-incident theory of liability. *See id.*

2. In the wake of *Connick*, respondents here attempt to shift to a pattern-or-practice theory of liability. Supp. Br. Resps. 2-3. But, as in *Connick*,

respondents never pleaded or proved a pattern of constitutional violations by Reno's officers that might give rise to a training violation—in other words, jail suicides allegedly due to the deliberate indifference of police officers. On the contrary, they argued only that *single-incident* liability should lie because the need for suicide-prevention training and policies was obvious. First Am. Compl. ¶64; Pls.' Opp'n Summ. J. 29-30; Appellants' Opening Br. 47-48. Even their brief in opposition to certiorari does not contain the word "pattern." Respondents never pleaded below that four previous suicides in the sixteen months preceding Clustka's April 28, 2005 suicide, Opp. 6, out of more than 24,000 jail admissions, constituted a pattern of suicides—let alone a pattern of constitutional violations caused by failure to train. Nor did they ever adduce any evidence connecting those suicides at the *county* jail to the *city's* officer-training policies.

As in *Connick*, nothing in the record here connects those suicides to one another or makes them factually similar enough to prove a pattern attributable to the city's failure to train. Respondents erroneously claim the Ninth Circuit "identified specific evidence of a substantial pattern of constitutional violations." Supp. Br. Resps. 3. The Ninth Circuit found no such pattern, but simply marshaled evidence to show that jail suicides were "highly predictable" and thus could support single-incident liability for failure to train. Pet. App. 47-48. Nowhere does its opinion use the word "pattern." Nor is suicidal-risk detection "'a relevant respect'" in which *police officers*, not medical personnel, require training. Supp. Br. Resps. 1

(quoting *Connick*, slip op. at 9). *Connick* thus rejects respondents' loosening of the pattern requirement. *Id.* at 3.

The decision below accepted the single-incident-liability theory. It effectively adopted a blanket rule that assessing suicide risk is a recurring part of officers' duties that always requires training even absent a pattern of constitutional violations. That amounts to a *per se* rule authorizing municipal liability for any jail suicide whose symptoms police officers could have detected, even where no pattern of violations notified the city of a need for training.

The 5-2 circuit split on municipal liability for failure to provide suicide-prevention training, absent proof of a pattern of constitutional violations, persists after *Connick*. Pet. 18-23; Pet. Reply 3-6. The issue remains an important and recurring one that requires this Court's resolution. *Amicus* Br. 6-17.

3. The second question presented and circuit split implicated in this case are not affected by *Connick*. That issue concerns the scope of individual officers' liability and qualified immunity for failure to diagnose and report symptoms of suicidal tendencies. Pet. 28-37.

Connick does, however, underscore the need for affirmative proof of actual causation. Slip op. at 7 n.5. As petitioners have argued, "there is no basis here to find either deliberate indifference to a known risk or causation." Pet. 35. Six sets of trained medical professionals screened Clustka but did not detect a genuine suicide risk. Three of those medical screenings, two more arrests, and almost two days intervened between the seatbelt incident and Clustka's suicide. Pet. 6-10; Pet. App. 7, 14-15. There is no basis on which a jury could find that petitioners' actions caused Clustka's suicide or could have prevented it.

CONCLUSION

For the reasons set forth above and in the petition and reply brief, this Court should grant the petition; or in the alternative summarily reverse the decision below; or in the alternative grant the petition, vacate, and remand for further proceedings in light of *Connick*.

Respectfully submitted,

Stephanos Bibas
Nancy Bregstein Gordon
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

John J. Kadlic
Counsel of Record
Donald L. Christensen
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

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**On Petition For A Writ Of Certiorari
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For The Ninth Circuit**

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PETITIONERS' REPLY BRIEF

◆

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL SUPREME
COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

JOHN J. KADLIC
Counsel of Record
DONALD L. CHRISTENSEN
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondents try to portray the Ninth Circuit's decision as an unremarkable application of settled law to the facts of this case, but they cannot obscure the radical holding below. The city and officers here did not "do nothing" (Opp. 23); they followed prescribed procedures to deliver Clustka to trained medical professionals, relying on them for diagnosis and treatment. Yet the Ninth Circuit authorized municipal liability for failure to train police in suicide prevention, even though respondents did not plead a pattern of suicides. The decision below created a *per se* rule authorizing municipal liability if a city does not train officers in suicide detection and an officer fails to detect a suicide risk.

The Ninth Circuit's *per se* rule conflicts with decisions of five circuits that have refused to allow municipal liability for jail suicides. Diagnosing the risk of jail suicides is the job of doctors, not police. Respondents cite no other case upholding liability for failure to train law-enforcement officers in these circumstances. The decision below also contravenes *City of Canton* v. *Harris*, particularly its respect for federalism and its ban on reasoning backwards, inferring municipal-policy liability from the mere fact of harm. 489 U.S. 378, 390-92 (1989).

The Ninth Circuit's ruling on individual-officer liability also conflicts with decisions of other circuits and of this Court in *Farmer* v. *Brennan*, 511 U.S. 825 (1994). Courts faithful to *Farmer* refuse to base deliberate-indifference liability upon officers' mere awareness of facts indicating risk. And because no previous decision has held officers liable in these circumstances, qualified immunity must protect the officers.

Petitioners have consistently raised these extremely important issues.[1] This Court's review is imperative.

I. THE NINTH CIRCUIT'S *PER SE* RULE OF MUNICIPAL LIABILITY IRRECONCILABLY CONFLICTS WITH DECISIONS OF FIVE OTHER CIRCUITS

Respondents never pleaded that Reno had a pattern of jail suicides attributable to inadequate officer training or policies, which might have notified city policymakers of the need to train. On the contrary, they argued only that *single-incident* liability should lie because the need for suicide-prevention training and policies was obvious. First Am. Compl. ¶64; Pls.' Opp'n Summ. J. 29-30; Appellants' Opening Br. 47-48.[2]

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[1] Although respondents imply that petitioners waived both questions presented, Opp. 13, they discuss waiver only regarding the merits of the officers' individual liability, Opp. 13-16. (We refute that waiver contention *infra* pp. 8-9.) Respondents do not contest that petitioners have properly preserved the issues of municipal liability and qualified immunity.

[2] Respondents never pleaded below that four previous suicides in the sixteen months preceding Clustka's April 28, 2005 suicide, Opp. 6, out of more than 24,000 jail admissions, constituted a pattern of constitutional violations, nor did they adduce

(Continued on following page)

The decision below accepted that argument. It effectively adopted a blanket rule that suicide risk is a recurring part of officers' duties that always requires training. That amounts to a *per se* rule authorizing municipal liability for any jail suicide whose symptoms police officers could have detected, even where no pattern notified the city of a need for training.

The First, Fifth, Sixth, Seventh, and Eleventh Circuits stand squarely to the contrary. They reject municipal liability in similar circumstances, independent of their distinct holdings on individual liability. *Cf.* Opp. 12 n.1, 25. Respondents do not cite a single decision in which these courts affirmed municipal liability for failure to train officers or adopt policies on suicide prevention. Instead, they quote dicta from cases whose holdings conflict with the decision below.

The Fifth Circuit has repeatedly rejected, as a matter of law, municipal liability for failure to train in similar circumstances. Detainees' right to "adequate medical care" does not require cities to train police in suicide-prevention "psychological screening." *Burns* v. *Galveston*, 905 F.2d 100, 104 (5th Cir. 1990) (affirming summary judgment). "Failure to train police officers in [suicide] screening procedures" does not "rise to the level of a constitutional deprivation."

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any evidence connecting those *county*-jail suicides to the *city's* officer-training policies.

Id. Burns turned not on whether officers heard the suicide threat, but on a broader recognition that officers lack "the skills of . . . experienced medical professional[s] with psychiatric training." *Id.*; *see also Whitt* v. *Stephens*, 529 F.3d 278, 284 (5th Cir. 2008) (affirming summary judgment); *Hare* v. *Corinth*, 74 F.3d 633, 635-36, 645-46 (5th Cir. 1996) (en banc) (vacating individual liability in non-municipal-liability case).

The Seventh Circuit affirmed summary judgment for a county even where officers mistakenly discounted a drunken suicide threat as a joke. Determining whether a threat is serious "is not a judgment likely to be much assisted by special training." *Boncher* v. *Brown*, 272 F.3d 484, 488 (7th Cir. 2001) (Posner, J.). *Woodward* v. *Correctional Medical Services*, 368 F.3d 917, 928-29 (7th Cir. 2004) is inapposite. It involved failure to train medical professionals – not police – whose jobs involved suicide screening.

Likewise, the Eleventh Circuit recognized that a "suicide threat made under the influence of drugs or alcohol did not furnish jailers with reason to believe decedent was suicidal." *Popham* v. *Talladega*, 908 F.2d 1561, 1564 (11th Cir. 1990). Respondents claim that *Popham* turned on the jailers' failure to hear the threat, but *Popham*'s holding was broader. It followed *Harris* in rejecting municipal liability for "failure to train jail personnel to screen detainees for suicidal tendencies." *Id.*

The Sixth Circuit likewise rejects municipal liability for failure to train officers to diagnose suicidal symptoms. As a matter of law, neither officers nor a city can be liable for failing to diagnose suicidal tendencies in the distressed or angry statements of a drunk arrestee. *Barber* v. *Salem*, 953 F.2d 232, 239-40 (6th Cir. 1992).[3]

Finally, the First Circuit holds that cities need not train officers to diagnose "intoxicated and potentially suicidal detainees." *Manarite* v. *Springfield*, 957 F.2d 953, 959 (1st Cir. 1992). While some suicide-prevention policies existed in that case (Opp. 29), here too Clustka received six medical screenings pursuant to standard policy. If this case had arisen in the First Circuit, *Manarite* would bar recovery.

In short, five circuits have rejected municipal liability for failure to train officers or adopt suicide-prevention policies. Those circuits' holdings necessarily conflict with the Ninth Circuit's *per se* rule authorizing municipal liability wherever a city fails to train officers to diagnose symptoms and prevent a suicide. Apart from the Third and Ninth Circuit cases

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[3] *Cf. Cooper* v. *Washtenaw*, 222 F.App'x 459, 469 (6th Cir. 2007) (leaving open possibility of individual liability if officer actually knew inmate was on suicide watch and consciously disregarded it). *Cooper* did not determine whether the officer's actions might amount to a city policy; it did not substantively discuss suicide-prevention training, let alone resolve the issue. *Id.* at 473. And the inmate in this case had not been placed on suicide watch, which would have created actual notice.

(Pet. 22), respondents cite no case from these five circuits or any other that upholds municipal liability. Only this Court's intervention can resolve this entrenched, 5-2 circuit split. Pet. 23.

II. BY AUTHORIZING MUNICIPAL LIABILITY ABSENT PROOF OF A PATTERN OF VIOLATIONS, THE NINTH CIRCUIT'S HOLDING CONFLICTS WITH *CITY OF CANTON* v. *HARRIS*

"[I]nadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Harris*, 489 U.S. at 388. Municipal liability for failure to train normally requires a pattern of employee wrongdoing, showing that city policymakers chose to disregard a "plainly obvious" "need for further training." *Id.* at 390 n.10; *accord Bryan Cty.* v. *Brown*, 520 U.S. 397, 409 (1997). Single-incident failure-to-train liability is exceptional and appropriate only in "a narrow range of circumstances." *Id.* at 409. The only example of single-incident liability this Court hypothesized was quite narrow. It involved giving police guns without teaching them about their lawful use, *Harris*, 489 U.S. at 390 n.10, where harm to citizens was inevitable.

The risk of injury is not comparably certain if police officers lack training to detect the risk that an arrestee will later commit suicide in jail, when there are medical professionals who screen for that risk. As three concurring Justices warned, "[w]ithout some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Id.* at 395 (O'Connor, J., concurring in relevant part, dissenting in part). Diagnosing mental illness is no part of an officer's usual duties, and there are no constitutional guideposts to direct municipalities. *Id.* at 395-96. Relying on medical screening, rather than training police to detect jail-suicide risk, is not deliberate indifference to harm that is "substantially certain to result." *Id.* at 396.

As the dissenters below stressed, the "city more than fulfilled [its] obligation" to make "psychiatric care available to" Clustka. Pet. App. 7. Medical professionals evaluated her on six separate occasions. "The city didn't fail to address the problem of inmate suicide; it failed to address the problem in the way [the majority] think[s] best." *Id.* at 9. *Harris* warned against just this type of "judicial meddling," *id.*, as well as "an endless exercise of second-guessing municipal employee-training programs," 489 U.S. at 392; Pet. 27-28.

III. BY AUTHORIZING INDIVIDUAL LIABILITY, THE NINTH CIRCUIT HAS GUTTED *FARMER v. BRENNAN'S* ACTUAL-KNOWLEDGE REQUIREMENT AND QUALIFIED IMMUNITY, AS PETITIONERS HAVE CONSISTENTLY ARGUED

1. Respondents claim that petitioners waived the individual-liability merits issue by failing to "argue[ ] that, if they had such actual knowledge," "they *lacked a duty to report* suicide risks." Opp. 15, 13. They attack a straw man. Petitioners neither made that argument below nor make it now.

Petitioners did, however, advance below the same claim that they make now: evidence of notice of possible symptoms is insufficient alone to support a finding of actual knowledge and deliberate indifference. They argued that "[p]laintiffs were required to present sufficient evidence that would allow a trier of fact to conclude the officers knew Clustka was suicidal," but "[t]he undisputed facts of this case are insufficient to meet these standards" of inference required by *Farmer* and its progeny. Appellees' Answering Br. 31. "Plaintiffs produced no evidence that either officer actually knew Clustka was at substantial risk of serious harm. Instead, they argue only that the circumstances support an inference that they were negligent in diagnosing her condition. . . ." *Id.* at 32-33. They disputed, as a matter of law, liability for an "alleged failure to recognize a prisoner's alleged heightened suicidal risk" absent direct evidence of actual knowledge. Pet. Reh'g En Banc 11. That is the same claim advanced here. Pet. 34-35.

Without such knowledge, respondents seem to agree that no claim lies and no duty to report exists. *See* Opp. 14. Because the officers had no duty to – and did not – diagnose those symptoms, they had no duty to report them.[4]

2. Respondents deny that the decision below imposed a duty on law-enforcement officers to "diagnose and report detainees' symptoms of suicidal tendencies." Opp. 1. But they repeatedly insist that the officers had actual knowledge that Clustka was at genuine risk of suicide. Opp. 1-2, 12, 16-17, 23-24. Respondents embrace the Ninth Circuit's approach that one can infer actual knowledge of a current

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[4] The only case respondents cite is inapposite. In *Zobrest* v. *Catalina Foothills*, a party failed to argue below that a school district's policy violated the state constitution and federal regulations, brand-new sources of law never mentioned before. 509 U.S. 1, 7-8 (1993). Petitioners in *Zobrest* thus failed to preserve distinct claims. Here the questions presented involve the same claims under 42 U.S.C. §1983 and the Due Process Clause at issue below. *See Yee* v. *Escondido*, 503 U.S. 519, 533-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below [or] the manner in which the question was framed below."); *Harris*, 489 U.S. at 383-84 (addressing on merits even party's substantial departure from position below). Furthermore, *Zobrest* dealt with the canon of constitutional avoidance, not waiver. 509 U.S. at 7-8. And here, the decision below expressly considered and resolved the issues. Pet. App. 10, 30-35.

suicide risk from awareness of possible symptoms, such as suicide threats. Despite respondents' semantic quibbling, that is tantamount to imposing a duty on police to diagnose and report jail-suicide risk.

This approach directly conflicts with *Farmer*. To prove deliberate indifference, plaintiffs must establish two distinct prongs. "[T]he official must both [1] be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and* [2] *he must also draw the inference*." *Farmer*, 511 U.S. at 837 (emphasis added). The decision below effectively collapsed the second prong into the first one, allowing every plaintiff to defeat summary judgment and nullify *Farmer* by alleging knowledge based on awareness of symptoms. Here, the officers have consistently described the seatbelt incident as the manipulative actions of a belligerent drunk, not a genuine suicide attempt. Because they are not medical professionals, they could not and did not have to diagnose whether Clustka's threats were serious. As non-medical intermediaries, not charged with her ultimate custody, they did not have to diagnose or treat her. All they had to do was to bring Clustka to medical professionals for screening, which they did.

Only in exceptional cases can a factfinder "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 842; *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 734-35, 738 (1994) (risk obvious where officers tied inmate to hitching post, shirtless under burning sun, for seven hours without bathroom breaks). An inmate's bleeding wound may reflect an obvious risk of harm, but suicidal symptoms rarely reveal such obvious risks and usually require expert medical diagnosis.

Where facts do not clearly prove the seriousness of a threat – as when a belligerent drunk threatens suicide – courts routinely grant summary judgment. Thus, awareness of a suicide threat satisfies *Farmer*'s first prong, but does not suffice to prove that the official actually inferred a genuine suicide risk, as required by *Farmer*'s second prong. *See, e.g.*, *Domino* v. *Texas Dep't Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (affirming summary judgment for prison *psychiatrist* who mistakenly discounted inmate's statement that "he'd kill himself, he wanted to die"); *Bell* v. *Stigers*, 937 F.2d 1340, 1341, 1344 (8th Cir. 1991) (affirming summary judgment despite inmate's comment to jailer: "'Well I think I'll shoot myself.'"), *overruled on other grounds by Farmer*, 511 U.S. at 837.

This Court, in *Davidson* v. *Cannon*, rightly distinguished negligent failure to report information from deliberate indifference. 474 U.S. 344, 347-48 (1986). Officials are not deliberately indifferent where they learn of a threat but erroneously or even negligently discount its seriousness. *Id.* at 347-48. That is exactly what happened here.

3. The decision below conflicts with decisions of the First and Third Circuits. In those circuits, officers cannot be held liable just because they are on notice

of possible symptoms; they must actually know of, yet ignore, a risk. *Williams* v. *West Chester*, 891 F.2d 458, 465 (3d Cir. 1989) (rejecting liability because there was "no direct evidence" officers "actually knew" of decedent's "suicidal propensity"); *Freedman* v. *Allentown*, 853 F.2d 1111, 1113, 1117 (3d Cir. 1988) (refusing to infer actual knowledge of risk from awareness of suicidal tendencies and past attempts); *see Elliott* v. *Cheshire*, 940 F.2d 7, 9, 12 (1st Cir. 1991) (officer not liable for not passing along information about possible symptoms of suicide risk). Unlike the decision below, each of these cases put teeth into *Farmer*'s and *Davidson*'s actual-knowledge prong for deliberate indifference. Thus, they found no duty to report information relevant to diagnosing suicidal tendencies.

4. Respondents likewise err in claiming that petitioners have conceded causation, Opp. 13-14, which is subsumed within the questions presented. As the petition argued, "there is no basis here to find either deliberate indifference to a known risk or causation." Pet. 35. Six sets of trained medical professionals screened Clustka but could not detect a genuine suicide risk. Three of those medical screenings, two more arrests, and almost two days intervened between the seatbelt incident and the suicide. Pet. App. 7, 14-15. There is no basis for finding that petitioners' actions caused Clustka's suicide or could have prevented it.

5. Because the First and Third Circuits rejected liability in similar circumstances, qualified immunity

protects the officers. Pet. 36-37. They could not have understood that they were violating their duties. Each case respondents cite, Opp. 24, involved direct evidence that custodial officers at a jail knew of and affirmatively disregarded suicide risks. *Snow* v. *Citronelle*, 420 F.3d 1262, 1270 (11th Cir. 2005) (jailer told plaintiffs their daughter was suicidal but took no other action); *Turney* v. *Waterbury*, 375 F.3d 756, 760-61 (8th Cir. 2004) (sheriff "personally knew [decedent] was volatile," had been told of prior suicide attempt, and *affirmatively prevented* intake officer from filling out suicide-screening form); *Cavalieri* v. *Shepard*, 321 F.3d 616, 619-22 (7th Cir. 2003) (after victim's mother warned officer of suicide risk and implored him to put son on suicide watch and not leave him alone, officer promised to do so but did not); Pet. App. 12-13. None involved police who entrusted arrestees to jailers and medical professionals for medical screening.

IV. THE NINTH CIRCUIT'S HOLDING GREATLY BURDENS CITIES AND OFFICERS

The entrenched conflict among the circuits confuses cities and law-enforcement officers. Pet. 37-39. They need guidance about whether officers must serve as psychiatrists or may instead rely on medical professionals. The decision below burdens cash-strapped municipalities with novel training requirements. *Amici* Br. 6-17. Judge Reinhardt's opinion, left unchecked, is a "sweeping and dangerous precedent" that empowers federal judges to undermine "our tradition of local self-government." Pet. App. 16

(Kozinski, C.J., dissenting from denial of rehearing en banc).

◆

CONCLUSION

This Court should grant the petition, or alternatively summarily reverse the decision below.

Respectfully submitted,

STEPHANOS BIBAS
NANCY BREGSTEIN GORDON
UNIVERSITY OF PENNSYLVANIA
LAW SCHOOL SUPREME
COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

JOHN J. KADLIC
Counsel of Record
DONALD L. CHRISTENSEN
CITY OF RENO
Post Office Box 1900
Reno, NV 89505
(775) 334-2050
kadlicj@reno.gov

Counsel for Petitioners

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②

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IN THE
Supreme Court of the United States

CITY OF RENO, RYAN ASHTON, AND DAVID ROBERTSON,
Petitioners,
v.
CHARLA AND DUSTIN CONN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES & NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

LARS ETZKORN
National League of Cities
1301 Pennsylvania Ave., N.W.
Washington, DC 20004-1763
etzkorn@nlc.org

JACQUELINE J. BYERS
National Ass'n of Counties
25 Massachusetts Ave. NW 5th Fl.
Washington, DC 20001
jbyers@naco.org

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
TAMARA L. GRAHAM
MICHAEL W. STEVENS
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

Counsel for Amicus Curiae IMLA

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST[1]

Amicus curiae the International Municipal Lawyers Association ("IMLA") is a non-profit, non-partisan, professional organization consisting of more than 3,500 members that has been serving local government attorneys since 1935. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities. Since its establishment, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them. IMLA has appeared as amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus curiae the National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Letters from the parties consenting to the filing of this *amicus* brief have been filed with the Clerk of the Court.

Amicus curiae the National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties. NACo advances issues with a unified voice before the federal government, improves the public's understanding of county government, and assists counties in finding and sharing innovative solutions through education and research.

In their petition for certiorari, Petitioners have demonstrated in detail the error of the Ninth Circuit's ruling and analyzed the conflicts of authority justifying this Court's intervention. Pet. 17-39. *Amici* agree with Petitioners that the circuit split regarding the purported duty of municipalities to train law enforcement officers to diagnose suicidal tendencies is ripe for resolution by the Court. Petitioners are also correct in their legal analysis of the 42 U.S.C. § 1983 deliberate indifference standard: diagnosing suicidal ideation is not within the scope of a law enforcement officer's regular and foreseeable duties, and it was not deliberate indifference on the part of the city of Reno to determine that licensed medical professionals should be the ones to diagnose a detainee's tendency to commit suicide.

IMLA, NLC, and NACo offer this brief as *amici curiae* to emphasize to the Court the importance of its granting the requested writ and reversing the erroneous ruling of the Ninth Circuit for three reasons: (1) the Court must resolve the split among the circuits to give clearer guidance to municipalities on the constitutional requirements of law-enforcement training; (2) the Ninth Circuit's ruling should not be allowed to stand, because the resultant broadening of *City of Canton v. Harris*, 489 U.S. 378 (1989), would place a grave economic burden on struggling municipalities and impose the will of the federal courts over decisions best made by democratically elected state and local officials; and (3) broadening *Harris* to require training of law enforcement officers to diagnose suicidal tendencies will divert training resources, detract from the officers' primary duties, and stray into areas that are and should be the province of medical professionals.

SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit, over the strong dissent of seven of its judges, has joined the minority side of a five-to-two inter-circuit split regarding whether municipalities may be held liable under 42 U.S.C. § 1983 for failure to train law enforcement officers to diagnose the suicidal tendencies of detainees. By solidifying that split in authority, the Ninth Circuit has further complicated the legal landscape and made it more difficult for municipalities to know how to proceed in training their law enforcement officers. *Amici* ask the Court to grant certiorari in this case to resolve the split and thus provide definitive guidance to municipalities in their efforts to establish constitutionally sufficient training programs.

Further, the Ninth Circuit's decision to expand the reach of *Harris* places an insupportable burden on municipalities to provide additional and expensive specialized training to their law enforcement officers. The Court should not constitutionalize a suicide-risk training requirement during these difficult economic times, when municipalities are facing significant budget shortfalls and the restriction of already stretched resources. One of the consequences of the Ninth Circuit's ruling below is to force municipalities to allocate their limited funds as the courts, rather than democratically elected local officials, see fit.

Finally, the ruling below will force municipalities to divert the training of law enforcement officers, rendering them less effective in the most important aspects of their duties. The city of Reno and most other municipalities have medical screening procedures already in place and staffed by personnel properly trained to diagnose suicidal ideation. Requiring law enforcement officers to add psychiatric diagnoses to their more traditional duties of protecting their communities and enforcing the law will only serve to undermine the services those officers have been hired to provide.

ARGUMENT

I. The Ninth Circuit's Decision Below Places An Insupportable Burden On Municipalities To Ensure That Law Enforcement Officers Are Equipped To Make Medical Diagnoses of Suicidal Tendencies.

A. The Split Among The United States Courts Of Appeals Provides No Clear Guidance To Municipalities On The Kind Of Training To Provide To Law Enforcement Officers To Meet Legal Standards.

As Petitioners have pointed out, the United States Courts of Appeals are divided over the issue of whether law enforcement officers must be trained to diagnose suicidal ideation in detainees. The First, Fifth, Sixth, Seventh, and Eleventh Circuits have all ruled that it is not deliberate indifference for a police officer not to diagnose and report the suicidal tendencies of detainees. *See Estate of Boncher v. Brown County*, 272 F.3d 484, 485-86 (7th Cir. 2001); *Manarite v. City of Springfield*, 957 F.2d 953, 959-60 (1st Cir. 1992); *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992); *Popham v. City of Talladega*, 908 F.2d 1561, 1564 (11th Cir. 1990); *Burns v. City of Galveston*, 905 F.2d 100, 104 (5th Cir. 1990). In each of these cases, like in the case below, officers were faced with intoxicated detainees who ultimately committed suicide, but each court concluded that the officers' constitutional duties did not include diagnosing the suicidal tendencies of the detainees.

The Ninth Circuit's decision to join the minority view of the Third Circuit only widens and solidifies the split. *See Simmons v. City of Philadelphia*, 947 F.2d 1042, 1049 (3d Cir. 1991). The ruling throws municipalities across the country into confusion regarding the constitutional requirements for training their law enforcement officers. The split in authority makes it impossible for municipalities to know precisely how expansive to make their law-enforcement training and just how much expanding the training will cost them. *Amici* ask this Court to grant certiorari to resolve this issue regarding police training and provide definitive guidance to state and local governments.

B. This Court's Resolution Of The Question Presented Is Important In Light Of The Fiscal Challenges Municipalities Face.

This Court's resolution of the question presented is particularly critical given the financial straits in which many municipalities operate. The global economic downturn since 2008 has caused especially significant financial harm to local governments. Eighty-eight percent of city finance officers reported that in 2009 they were less able to meet their fiscal needs than they were in 2008, as sales tax and general fund revenues fall. *See* CHRISTOPHER W. HOENE & MICHAEL A. PAGANO, NAT'L LEAGUE OF CITIES, CITY FISCAL CONDITIONS IN 2009, 1, 3 (Sept. 2009).

More troubling for local governments is the nearly unprecedented decline in the real-estate market.

Local governments are largely dependent on property tax revenue. Because of the delay in appraised values leading to reduced tax collections, the full extent of the bursting of the real-estate bubble has not yet been felt and may cause even greater economic havoc in 2010, 2011, and 2012. *Id.* at 3.

Large cities such as Chicago and San Francisco are facing budget shortfalls in excess of $500 million, while smaller cities such as Bossier City, Louisiana, have thirteen-percent shortfalls and face cutting equivalent percentages of city positions. Alan Greenblatt, *Local Squeeze: The Budget Pain Felt by State Lawmakers for the Past Two Years Has Made Its Way to Cities and Counties*, National Conference of State Legislatures (May 2010), *available at* http://www.ncsl.org/?tabid=20180.

Amicus NACo conducted a survey of counties to gauge the continuing impact of the economic downturn on a sample of counties across the country. *See* Jacqueline J. Byers, *How Are Counties Doing? An Economic Survey*, National Association of Counties (Nov. 2009), *available at* http://www.naco.org/Template.cfm?Section=Surveys&template=/ContentManagement/ContentDisplay.cfm&ContentID=32326. According to the survey, fifty-six percent of counties report starting their fiscal years with up to $10 million projected shortfalls. *Id.* at 3. Forty-seven percent stated that their shortfall increased after the beginning of the fiscal year, with those additional shortfalls nearing $10 million. *Id.* These shortfalls have been produced by a decrease in the traditional revenue streams from property taxes, state and federal funding, and sales taxes. Eightytwo percent of these counties anticipate the shortfalls extending into the next fiscal year. *Id.* Counties, like cities, are dealing with the economic turmoil by slashing their budgets and shuffling their resources.

Although local governments often cut police and public safety funding only as a last resort, the current economic difficulties have forced them to make such cuts. In Pennsylvania, nineteen suburban and rural police agencies closed over a fifteen-month period ending in May 2009, and seven others cut patrols; in Minnesota, nine small police agencies closed in a five-month period. Kevin Johnson, *Economy Limiting Services of Police*, USA TODAY, May 18, 2009, at 01A. The problem is not limited to small or rural communities: if adopted, the New York Governor's 2011 proposed state budget cuts would lead to the layoffs of over 3,000 New York City police officers. CITY OF NEW YORK OFFICE OF MANAGEMENT AND BUDGET, FINANCIAL PLAN SUMMARY FISCAL YEARS 2010-2014 23 (Jan. 28, 2010), *available at* http://www.nyc.gov/html/omb/downloads/pdf/sum1_10.pdf.

Police-training budgets in particular are facing drastic cuts. Even the city of Reno cut its police-training budget by more than twenty percent between fiscal years 2008/2009 and 2009/2010, from $1.69 million to $1.35 million. CITY OF RENO, NEVADA 2009/10 BUDGET III-245 (May 22, 2009), *available at* http://www.reno.gov/index.aspx?page=171. Reno is not alone in the need to reduce police-training budgets: the state of Minnesota has decreased its police-training reimbursement rate from $423 per officer per year in 2003 to $341 per officer per year in

2010, a reduction of almost twenty percent, not taking into account inflation. Kari Petrie, *Tighter Budgets Make Police Training an Issue*, ST. CLOUD TIMES, Mar. 8, 2010, *available at* http://minnesota.publicradio.org/display/web/2010/03/08/police-training. Local law enforcement agencies are already stretched thin. Before municipalities allocate scarce resources to comply with the Ninth Circuit's erroneous ruling, this Court should resolve the conflict in authority.

C. The Decision Below Represents Inappropriate Judicial Interference With The Effective Deployment Of Resources By Municipalities.

In his dissent to the opinion below, Chief Judge Kozinski warns that the majority opinion represents "unprecedented judicial interference in our local institutions." *Conn v. City of Reno*, 591 F.3d 1081, 1085 (9th Cir. 2010) (Kozinski, J., dissenting). Deployment of limited local resources is an undertaking best conducted by the people closest to and with the most knowledge of those resources and the needs of the local community. Kozinski's dissent recognizes that "any redefinition of the role of the state should occur under the supervision of democratically elected officials, not unaccountable federal judges." *Id.*

This Court, in the opinion that the Ninth Circuit seeks to widen with its ruling in *Conn*, cautioned against the danger presented by increased judicial scrutiny over the training programs of law enforcement officers to the autonomy of municipalities, as well as to the principles of federalism. The Court in *Harris* narrowed its holding to avoid retrospective judicial evaluation of police-training programs precisely because "[i]t would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs." *Harris*, 489 U.S. at 392. This kind of second-guessing "the federal courts are ill suited to undertake, as well as [being] one that would implicate serious questions of federalism." *Id.*

More recently, this Court has expressed sustained concern over the financial impact of federal requirements imposed upon state and local governments, precisely the kind of impact that will result from the Ninth Circuit's ruling. In *Horne v. Flores*, the Court acknowledged that "[s]tates and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." 129 S. Ct. 2579, 2594 (2009). While *Horne* involved federal requirements for state education spending, the Court has articulated the same concerns in other contexts, such as when state and local governments are ordered to pay exorbitant awards of attorneys' fees pursuant to § 1983 litigation. *See Perdue v. Kenny A.*, 130 S. Ct. 1662, 1677 (2010) ("[S]tate and local governments have limited budgets, [and] money that is used to pay attorneys' fees is money that cannot be used for programs that provide vital public services.").

In the instant case, the Ninth Circuit's ruling, if affirmed, would impose substantial financial burdens on already cash-strapped municipalities. As of 2004, there were almost 780,000 sworn personnel with general arrest powers employed by state and local law enforcement agencies, and the vast majority of these personnel were employed by local police departments or sheriff departments. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2004 1, 2 (June 2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/csllea04.pdf.[2] Training all of these officers to diagnose suicidal ideation would impose huge costs on municipalities that would not be borne by the federal government despite being mandated by a federal court. As this Court recognized in *Horne* and *Kenny A.*, any such training requirement would only mean that other important legal programs would receive less funding. The Court should grant certiorari to resolve this issue and prevent the imposition of unnecessary police-training costs on and unwarranted judicial interference with local governments.

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[22] Data from 2006 indicates a total of 919,274 total officers (685,611 of them with general arrest powers), 90% of whom were employed by local police and sheriff departments. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006) *available at* http://www.albany.edu/sourcebook/pdf/t1262006.pdf.

II. The Ninth Circuit's Decision Below Threatens To Divert The Training Of Law Enforcement Officers, Thus Making Them Less Effective In Their Primary Duties.

A. Burdening Law Enforcement Officers With Diagnosis Of Psychological Conditions Will Detract From Their Training In Their Primary Law Enforcement Duties.

One of the more troubling consequences of the Ninth Circuit's ruling below is the burden it will place upon law enforcement officers as they train to serve their role as protectors of our communities. Most states have Peace Officer Standards and Training ("POST") organizations that establish requirements for the training of law enforcement officers. The POSTs set the curricula for the mandatory minimum basic training that usually takes place in academies for new officers and for the continuing in-service education requirements that officers must satisfy throughout their careers.[3]

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[3] Nearly all states have websites devoted to their POSTs, where training standards can be reviewed. *See, e.g.*, http://www.azpost.state.az.us/; http://www.post.ca.gov/; http://www.gapost.org/; http://www.idaho-post.org/; http://www.cole.state.la.us/programs/post.asp; http://www.dps.state.mn.us/newpost/posthome.asp; http://post.state.nv.us/; http://publicsafety.utah.gov/post/index.html; http://attorneygeneral.state.wy.us/post.htm.

In Nevada, in particular, the minimum standards for all law enforcement officers are dictated by state regulation. *See* Nev. Admin. Code § 289.300 (2007). Basic training for law enforcement officials includes 480 hours of mandatory training in several subject areas. Nev. Admin. Code § 289.140 (2008). Of Law and Legal Procedures, officers-in-training must learn civil liability, constitutional law, crimes against persons, crimes against property, juvenile law, laws governing coroners, laws relating to arrests, laws relating to drugs, miscellaneous crimes, probable cause, rights of victims, search and seizure, traffic laws, and use of force. *Id.* Officers must also study Patrol Operations and Investigations, including issues pertaining to the abuse of elderly persons, accident investigations, basic patrol procedures, child abuse and sexual abuse of children, domestic abuse and stalking, investigation of crime scenes, collection and preservation of evidence, fingerprinting, principles of investigation, techniques of interviewing and interrogation, DWI detection and standardized field sobriety testing, and unknown-risk and high-risk vehicle stops. *Id.*

The third general area of study is Performance Skills, including health, fitness and wellness, interpersonal communications, tactics for the arrest and control of suspects, methods for arrest, the use of less-than-lethal weapons, operation of emergency vehicles, provision of emergency first aid and CPR, searching of buildings, training in the use of firearms, and writing of reports. *Id.* Finally, basic training also includes The Functions of a Police Officer, specifically care of persons in custody, community policing, counter-terrorism and weapons of mass destruction, courtroom demeanor, the giving of testimony, crisis intervention, ethics in law enforcement, handling of persons who are mentally ill, history and principles of law enforcement, management of stress, National Crime Information Center procedures, survival of peace officers, systems of criminal justice, and the realities of law enforcement. *Id.* Basic training concludes with the requirement to pass both the state police certification examination and a physical fitness examination. *Id.*

After an officer in Nevada has completed basic training and has been certified by the state, he or she must annually thereafter complete twenty-four hours of additional training. Nev. Admin. Code § 289.230 (2008). Part of this additional training includes biannual firearms and other weapons certification, defensive tactics, handling of suspects, and reviewing the policies of the officer's employing agency. *Id.*

Other states follow similar curricula and require a similar number of hours of training. *See, e.g.*, VIRGINIA DEP'T OF CRIMINAL JUSTICE SERVICES, PERFORMANCE OUTCOMES, TRAINING OBJECTIVES, CRITERIA, AND LESSON PLAN GUIDES FOR COMPULSORY MINIMUM TRAINING FOR LAW ENFORCEMENT OFFICERS, (2009), *available at* http://www.dcjs.virginia.gov/standardsTraining/compulsoryMinimumTraining/officers.cfm. At a minimum, law enforcement officers throughout the country must be trained in the substantive laws they are enforcing, techniques for investigation and solving crime, standards for handling suspects and detainees, use of weapons and other types of force, interpersonal and community interaction, and the constitutional limits to their actions, among other subjects.

To add another level of training as advanced and specialized as the psychiatric diagnosis of mental illness or suicidal ideation would detract from the training that allows them to serve and protect their communities in a safe, professional, and effective manner.

This Court recognized in *Harris* the multiple areas of training law enforcement officers must master to serve their important role in society. *Harris* considered cases that addressed police training in just a few areas, including the proper force for arrests, detention, interrogation, obtaining and executing warrants, and searching detainees. *See Harris*, 489 U.S. at 383 n.3, 387 n.6. The Court should heed Chief Judge Kozinski's warning that "[a]s police devote time and energy to judicially-imposed obligations, they will have less time and attention to devote to preventing crime, protecting their own safety, and avoiding other types of constitutional violations." *Conn*, 591 F.3d at 1089 (Kozinski, J., dissenting).

B. Burdening Law Enforcement Officers With Identification Of Suicidal Ideation Is Unnecessary When The Detainee Will Be Evaluated By Medical Professionals.

Chief Judge Kozinski's dissent to the Ninth Circuit's ruling points out the danger of the kind of diversion of resources that *amici* wish this Court to prevent. If the Ninth Circuit's ruling is allowed to stand, "Judges will henceforth micromanage the police, who in turn will serve as mental health professionals." *Id.* at 1085 (Kozinski, J., dissenting). Mental health professionals are specially trained and licensed to diagnose and treat the kinds of psychological disorders that lead to suicide attempts. Although a police officer or layperson may at times be able to recognize that a person is at risk to attempt suicide, this Court should not make it a law enforcement officer's constitutional duty to make a diagnosis best left to licensed health-care professionals.

The decision below details that the Reno Police Department and the Washoe County Jail both had systems in place to allow detainees to receive medical attention when needed and to require each detainee to receive a medical screening by professionals trained in recognizing and addressing psychological symptoms that might lead to suicide. *Id.* at 1091-1093. Chief Judge Kozinski provided further detail regarding the multiple medical screenings Brenda Clutska herself received from Reno and Washoe County medical professionals:

> Right before her arrest, Clutska was evaluated by a team of medics. At intake, she was examined by a nurse who received annual training in suicide prevention. She was then held in a detoxification cell that was regularly monitored by jail staff and nurses. After discharge, she was arrested a second time and brought

> by police to an emergency room, where she was seen by a physician. And when she was arrested a third time, she was booked into the mental health unit of the jail, which is managed by a licensed social worker and staffed around the clock.

Id. at 1087 (Kozinski, J., dissenting). As both the majority and dissenting opinions make apparent, Reno and Washoe County had many procedures in place to provide the grossly intoxicated Clutska with medical and psychiatric screenings warranted by her behavior and condition. Having more extremely specialized training for its law enforcement officers would not have prevented the unfortunate outcome in this case, would serve only to diminish the officers' training in the more crucial aspects of their duty, and most importantly, is not required by the Constitution.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

LARS ETZKORN
National League of Cities
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-3173

etzkorn@nlc.org

JACQUELINE J. BYERS
EDWARD FERGUSON
National Ass'n of Counties
25 Massachusetts Ave., N.W., 5th Fl.
Washington, DC 20001
(202) 202-942-4285

jbyers@naco.org
eferguso@naco.org

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
TAMARA L. GRAHAM
MICHAEL W. STEVENS
Paul, Hastings, Janofsky & Walker LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com

CHARLES W. THOMPSON, JR.
Int'l Municipal Lawyers Ass'n
7910 Woodmont Ave, Suite 1440
Bethesda, MD 20814
(202) 466-5424

CThompson@imla.org

Counsel for Amici

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